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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COWLES COMMUNICATIONS, INC.,

Petitioner,

vs.

JOSEPH L. ALIOTO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the proper constitutional test of truth or falsity in a public official's libel action based on a lengthy magazine article is substantial truth of the article considered as a whole, or falsity in "one or more particulars."

2. Whether the trial court erred in instructing the jury that it must find petitioner's article false in one particular because testimony to that effect was not contradicted by admissible evidence.

3. Whether petitioner was denied its constitutional rights to a trial and to a trier of fact's determination of the factual issue of whether the magazine article was substantially true.

4. Whether the trial court properly concluded as a matter of law that petitioner's article was not substantially true because an isolated excerpt was held untrue at a prior trial.

5. Whether the trial court erroneously held petitioner guilty of actual malice, *i.e.*, recklessness, by (a) focusing on one isolated excerpt of the magazine article rather than considering the article as a whole and (b) making an objective assessment of the credibility of a source rather than a subjective analysis of the authors' state of mind.

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OPINIONS BELOW

The opinion of the Ninth Circuit is reported in *Alioto v. Cowles Communications, Inc.*, 623 F.2d 616 (9th Cir. 1980), and is reproduced as Appendix A, *infra*.

A previous opinion of the Ninth Circuit is reported in *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777 (9th Cir. 1975), and is reproduced as Appendix B, *infra*.

The memorandum opinion of the United States District Court for the Northern District of California is reported in *Alioto v. Cowles Communications, Inc.*, 430 F.Supp. 1363 (N.D. Cal. 1977), and is reproduced as Appendix C, *infra*.

JURISDICTION

The decision of the Ninth Circuit was rendered on July 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This is a libel suit against petitioner, the former publisher of LOOK magazine. Plaintiff-respondent, Joseph L. Alioto, was Mayor of San Francisco when the allegedly libelous article appeared in LOOK in 1969.

The article was entitled "The Web that Links San Francisco's Mayor Alioto and the Mafia: A LOOK report on the private Joseph Alioto and his relationships with organized crime." The first two paragraphs summarized the theme of the five-page, 5,100-word article:

> Mayor Joseph L. Alioto of San Francisco, the rising politician who came close to the Democratic nomination for the Vice Presidency in 1968, is enmeshed in a web of alliances with at least six leaders of La Cosa Nostra. He has provided them with bank loans, legal services, business counsel and opportunities, and the protective mantle of his respectability. In return, he has earned fees, profits, political support and campaign contributions.
>
> A lengthy investigation by LOOK reveals that some of these links between Alioto and the underworld go back almost a quarter of a century. They have not been broken.

The remaining seventy paragraphs of the article identify the "six leaders of La Cosa Nostra" (Jimmy Fratianno, Angelo Marino, Salvatore Marino, Emilio Giorgetti, Jimmy Lanza and Frank Bompensiero) and describe their illegal activities, legitimate business enterprises and relationships with each other and Alioto. The article is reproduced in full in Appendix D, *infra*.

Four trials have been held in this cause. The first ended in a hung jury. At the second trial the jury was asked, over petitioner's objection, to decide the issue of

truth or falsity of the article by answering the following special interrogatory (Question No. 1):

> Was the article false in one or more particulars?

Alioto had contended that the article was false in 27 particulars. (R.T. 148-52, 10/25/72.) The trial judge (Hon. Russell E. Smith) instructed the jury that the article was false in *one* particular, *i.e.*, the "Nut Tree meetings"[1]:

> "There is no evidence in this case from which you properly could find such [Nut Tree] meetings took place. . . . The only legal evidence in the case on the issue denied that the meetings occurred and there is no legal and competent evidence to the contrary. So, when you are considering the issue of whether the published article is false—and that, of course, is the issue outlined to you in question No. 1 here—and you come to the disputed statements in the article regarding the Nut Tree meetings, it should be clear to you that *the only competent evidence in this case on the issue will support only a finding that the statements are false.* (R.T. 158, 10/25/72; emphasis added.)

The jury thus necessarily answered "yes" to Question No. 1, "Was the article false in one or more particulars?"[2]

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1. These meetings were the subject of four paragraphs on the second page of the article. (App. D at 18, col. 2.) Nut Tree is a restaurant where, according to the four paragraphs, Alioto met with Jimmy Fratianno and other underworld figures to discuss possible business loans to Fratianno from a bank then being organized by Alioto, the First San Francisco Bank.

It is undisputed that the bank loans were later made and that Fratianno visited Alioto's law office in San Francisco before receiving the loans.

2. The jury was given a second interrogatory asking "Was the article defamatory?" The jury answered "Yes."

The jury, however, could not reach a verdict on the issue of actual malice, *i.e.*, whether the article was published with knowledge of falsity or reckless disregard of truth or falsity. Judge Smith held that a finding of actual malice by both judge and jury was required in order for Alioto to recover, in accord with *Wasserman v. Time, Inc.*, 424 F.2d 920, 922-23 (D.C. Cir.), *cert. denied* 398 U.S. 940 (1970) (Wright, J., concurring). Judge Smith reviewed the evidence and found that actual malice "was not shown with convincing clarity." He then granted petitioner's motion for judgment n.o.v. and entered final judgment for petitioner.

Alioto appealed. The Ninth Circuit noted that subsequent to Judge Smith's decision, it had "repudiated" the approach of Judge Wright in *Wasserman, supra*, that both judge and jury must find actual malice with convincing clarity, in *Guam Federation of Teachers, Local 1581 v. Ysrael*, 492 F.2d 438 (9th Cir.), *cert. denied* 419 U.S. 872 (1974). The Ninth Circuit reversed and remanded "for a new trial on the sole issue of actual malice." (App. 15a.) *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777 (9th Cir.), *cert. denied*, 423 U.S. 930 (1975).

A third trial was then held, on the sole issue of actual malice, and another hung jury resulted.

By agreement, the fourth trial was held before the Honorable William W. Schwarzer sitting without a jury. Judge Schwarzer found petitioner guilty of actual malice, *i.e.*, reckless disregard for truth, and awarded Alioto $350,000 in general damages plus costs. Alioto's demand for punitive damages was refused.

In finding recklessness, Judge Schwarzer confined his inquiry to the one "particular" in which he believed

the jury at the second trial had found falsity—the Nut Tree meetings or "Nut Tree allegations." He held that the authors and editor of the article should not have believed an informant who was the source of the Nut Tree meetings—one Tommy Lee Thomas, son-in-law of Jimmy Fratianno—because he said there were "obvious reasons" to doubt Thomas' veracity. (App. 28a-29a.)

On appeal, the judgment was affirmed. The Ninth Circuit held that petitioner had waived its right to claim prejudicial error in the instructions and special verdict of falsity at the second trial by not requesting a new trial on the issue of falsity after the second trial or on the first appeal. (App. 3a-4a.) The Ninth Circuit then held that petitioner had not been denied its right to a trial on the issue of substantial truth, or "gist" or "sting" of the article as a whole, because "the 'Nut Tree' allegations contained the 'gist' or 'sting' of the article and the truth of these allegations was fully tried and determined at the second trial. . . . " (App. 6a.)

The Ninth Circuit also rejected petitioner's claim that Judge Schwarzer improperly found actual malice by (1) focusing solely on Nut Tree, and (2) using an objective test rather than determining defendant's actual state of mind.

Petitioner now seeks certiorari.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision is in total discord with *New York Times Co. v. Sullivan*[3] and the First Amendment. The decision upholds a bizarre three-step process enabling a public official plaintiff to recover a staggering judgment from a media critic: (1) proving falsity by a special interrogatory asking the jury to determine if the article is false "in one or more particulars" and at the same time instructing the jury that it *must* find the article false in *one* particular, (2) holding as a matter of law that the one particular thus "found" false is the substance, "gist" or "sting" of the article, and (3) finding "subjective" malice (reckless disregard of truth) by stating that there were obvious reasons to doubt the veracity of an informant who supplied the false particular.

We believe a decision sanctioning even one of these steps would be a serious blow to free debate and would clearly warrant certiorari; the decision below embracing all three cries out for review and correction.

I.

THE FINDING OF "FALSITY" BELOW WAS FLAGRANT ERROR ON WHICH NO JUDGMENT CAN CONSTITUTIONALLY REST.

The plaintiff in a *New York Times* defamation suit has the First Amendment burden of proving both falsity and actual malice.[4] The burden of proving falsity is no

3. 376 U.S. 254 (1964).

4. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

less important than that of proving actual malice, and indeed, must be satisfied before the malice issue can even be reached. The judgment below cannot constitutionally stand because it is based on a palpably unjust and erroneous process of finding "falsity" of the LOOK article, *i.e.*, asking the jury to determine whether the article was false "in one or more particulars" and at the same time directing the jury that the article must be found false in at least one particular. Contrary to the Ninth Circuit's opinion, petitioner is not barred from raising this claim of error by waiver.

A. Substantial Truth Of The Article As A Whole, Rather Than Falsity In "One Or More Particulars," Is The Correct Test.

The first and most egregious error below was asking the jury to determine truth or falsity by answering the question, "Was the article false in one or more particulars?" The question compelled the jury to divide the 5,100 word article into segments and find "falsity" if any single segment, or "particular," was found untrue. This segmenting approach is not only expressly forbidden under California defamation law applicable in this diversity action but it clearly violates the First Amendment; the correct test of truth or falsity is whether the article, read as a whole, is substantially true.[5]

The California courts have repeatedly adhered to the substantial truth test in libel cases. As declared in *Emde v. San Joaquin County Central Labor Council*, 23 Cal. 2d 146, 160, 143 P.2d 20 (1943):

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5. Petitioner specifically raised this objection at the second trial on three separate occasions. See R.T. 177, 10/25/72; R.T. 7, 10/26/72; Defendant's Trial Memorandum Re Court's Proposed Jury Instructions filed 10/17/72.

> It is not necessary to prove the literal truth of an allegedly libelous accusation in every detail, so long as the imputation is substantially true so as to justify the "gist" or "sting" of the remark.

So also, in *Stevens v. Storke*, 191 Cal. 329, 334, 216 P. 371 (1923), the test was stated:

> In determining whether or not, under [California law], an article is libelous, it must be considered in its entirety. It may not be divided into segments and each portion treated as a separate unit.

Accord: *Hearne v. De Young*, 119 Cal. 670, 52 P. 150 (1898); *Jeffers v. Screen Extras' Guild, Inc.*, 162 Cal. App.2d 717, 729, 328 P.2d 1030 (1958); *Handelsman v. San Francisco Chronicle*, 11 Cal.App.3d 381, 386-387, 90 Cal.Rptr. 188 (1970); *Gantry Construction Company v. American Pipe and Construction Company*, 49 Cal.App. 3d 186, 195-196, 122 Cal.Rptr. 834 (1975); *Kurata v. Los Angeles News Publishing Company*, 4 Cal.App.2d 224, 227, 40 P.2d 520 (1935); *Mortensen v. Los Angeles Examiner*, 112 Cal.App. 194, 203 (1931); *Skrocki v. Stahl*, 14 Cal.App. 1, 5, 110 P. 957 (1910).

The substantiality test also is clearly woven into the tapestry of this Court's First Amendment jurisprudence. Although the Court in *New York Times* did not squarely confront the issue, it implicitly recognized that substantial, rather than literal, truth is the proper test of actionable libel.[6] In areas of speech regulation other than

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6. Plaintiff Sullivan had shown that there were at least two false segments in the *Times* advertisement in question and that defendant knew one of them was false. 376 U.S. at 257-59. The Court nonetheless refused to allow recovery, noting that the larger publication of which the false statements formed a part was "substantially correct" or defendant believed in good faith that it was substantially correct. 376 U.S. at 286.

(Footnote continued on following page)

libel, substantiality also has been a touchstone for defining the scope of First Amendment protection.

Thus, in the field of obscenity, the Court in *Roth v. United States*, 354 U.S. 476, 482 (1957), rejected the "isolated excerpt" test of *Regina v. Hicklin*, [1868] L.R. 3 Q.B., and held that obscenity may be found only if "the *dominant theme* of the material *taken as a whole* appeals to the prurient interest." (Emphasis added.) See also *Miller v. California*, 413 U.S. 15, 24 (1973). In measuring the scope of First Amendment protection in the field of "false light" invasion of privacy, the Court in *Time, Inc. v. Hill*, 385 U.S. 374, 386 (1967), stressed the substantiality principle:

> [T]he "establishment of minor errors in an otherwise accurate" report does not prove "fictionalization." Material and substantial falsification is the test.

Similarly, the substantiality test has influenced decisions concerning regulation of subversive or violent advocacy. In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Court held that isolated segments of the subject speech—*e.g.*, "Bury the Niggers"—must be evaluated in the context of the entire speech read as a whole.

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6. *continued*

The Court in *New York Times* also declared, with respect to the defense of truth:

> A rule compelling the critic of official conduct to guarantee the truth of *all* his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true *in all its factual particulars*. 376 U.S. at 279-80. (Emphasis added.)

Free speech cannot coexist with the libel test used below, allowing a public official to skewer a critic upon finding falsity "in one or more particulars." Because "erroneous statement is inevitable in free debate," *New York Times Co. v. Sullivan*, 376 U.S. at 271, nothing less than the test of substantial truth is necessary if "freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . ." *Id.* at 271-72.

B. The District Court Compounded Its Error By Directing The Jury To Find Falsity In One Particular.

The patently erroneous test of falsity "in one or more particulars" was pernicious enough in itself, but the trial court exacerbated the error by wrongly instructing the jury that it must find the article false in *one* particular, *i.e.*, the Nut Tree meetings.[7] The court thereby compelled the jury to answer "yes" to the question, "Was the article false in one or more particulars?" We submit that the court's Nut Tree instruction (reproduced on page 4, *supra*) cannot be read in any other manner.

The prejudicial error in instructing the jury that "the only competent evidence in this case on the issue will support only a finding that the [Nut Tree] statements are false" was two-fold: (a) it directed a verdict for respondent on a fact issue (falsity) on which he had the burden of proof; and (b) it compelled the jury to believe respondent's testimony denying the truth of the Nut Tree paragraphs.

While federal trial judges enjoy latitude in commenting on the evidence when charging the jury, the privilege is limited; it clearly may not extend to taking

7. See note 1, *supra*, and accompanying text.

away from the jury an ultimate fact issue that depends on credibility and directing a verdict on it. *E.g., Quercia v. United States*, 289 U.S. 466, 470-72 (1933); *Krasowski v. Greyhound Lines, Inc.*, 402 F.2d 445, 448 (6th Cir. 1968); *Nunley v. Pettway Oil Co.*, 346 F.2d 95, 99 (6th Cir. 1965).

Moreover, by instructing the jury to believe the testimony on Alioto's side denying the truth of the Nut Tree paragraphs, the court denied petitioner its right to have the jury determine the issue of credibility. The jury is the sole judge of the witnesses' credibility and is free to believe or disbelieve as it alone chooses. As this Court held in *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627-28 (1944), a trial judge cannot compel a jury to believe the testimony of a witness—particularly an interested witness—even if that testimony is uncontradicted:

> The rule has been stated "that if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony." *Spring Co. v. Edgar*, 99 U.S. 645, 658. "The jury, even if such testimony be uncontradicted, may exercise their independent judgment." *The Conqueror*, 166 U.S. 110, 131. "The mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 408.

Accord: Rhoades, Inc. v. United Air Lines, Inc., 340 F.2d 481, 485 (3d Cir. 1965); *Powers v. Continental Casualty Co.*, 301 F.2d 386, 388-89 (8th Cir. 1962).

In sum, the trial judge clearly invaded the jury's province, to petitioner's severe detriment, by directing a verdict in favor of Alioto on the alleged falsity of the Nut Tree statements.

C. Petitioner Has Not Waived Its Right To Challenge The Falsity Finding.

The Ninth Circuit entirely avoided the merits of petitioner's claimed errors in the special interrogatory and falsity instructions by a technical holding of waiver. This holding squarely conflicts with this Court's decisions. The Court has long held:

> "[C]ourts indulge every reasonable presumption against waiver" of fundamental constitutional rights and . . . we "do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).[8]

This principle applies most forcefully when, as here, preferred First Amendment rights are at stake, "rights which we value most highly and which are essential to the workings of a free society." *Speiser v. Randall*, 357 U.S. 513, 521 (1958).

Indeed, this Court has specifically considered and rejected a similar "waiver" claim in the *New York Times* libel context in *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967). The publishing defendant in *Beckley* had (1) failed to object at trial to an improper jury instruction on actual malice, and (2) proposed its own clearly erroneous jury instruction on actual malice. Plaintiff argued that defendant had waived any rights to challenge the jury instruction on appeal. This Court soundly rejected the argument:

> However, since it is clear that the jury verdict was rendered upon instructions which misstated the law

8. *Quoting Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (right to jury trial); *Ohio Bell Telephone Co. v. Public Utilities Comm'n.*, 301 U.S. 292, 307 (1937) (right to have property values determined by evidence); *Hodges v. Easton*, 106 U.S. 408, 412 (1882) (right to have jury determine all issues of ultimate fact).

> and since petitioner has properly challenged the sufficiency of the evidence, we have undertaken *an independent examination of the record as a whole "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."* (Emphasis added.)

389 U.S. at 85, quoting *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 285. *Accord*: *National Association of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974); *Time, Inc. v. Pape*, 401 U.S. 279, 285 (1971); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 11 (1970).

Even without special regard for First Amendment values, petitioner is not barred by waiver from challenging the falsity instructions and verdict at the second trial. On the first appeal, petitioner did not take a cross-appeal to attack the falsity errors at the second trial, because the final judgment was in petitioner's favor; as this Court held in *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939):

> A party may not appeal from a judgment or decree in his favor for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree.

Accord: Lindheimer v. Illinois Bell Telephone Co., 292 U.S. 151, 176 (1934); *W.W. Windle Co. v. C.I.R.*, 550 F.2d 43 (1st Cir. 1977). It is also settled that petitioner could properly challenge the falsity errors on the second appeal because those errors directly contributed to the final judgment in favor of respondent. "An appeal from a final judgment draws into question all rulings producing the judgment." *Herron v. Rozelle*, 480 F.2d 282, 285 (10th Cir. 1973); *Baldwin v. Redwood City*, 540 F.2d

1360, 1364 (9th Cir. 1976).[9] In addition, the Ninth Circuit itself has held in other cases that it has the inherent power to re-examine decisions and rulings on prior appeals and to alter or correct them "when justice requires that course." *United States v. Fullard-Leo*, 156 F.2d 756, 757 (9th Cir. 1946) *aff'd*, 331 U.S. 256 (1947); *Verrilli v. City of Concord*, 557 F.2d 664 (9th Cir. 1977).

II.

THE SUBSTANTIAL TRUTH, OR "GIST" OR "STING," HOLDING BELOW IS CONSTITUTIONALLY ERRONEOUS.

Part II of the Ninth Circuit's opinion states that a defendant

> can defeat a libel action by proving that the allegedly libelous publication, although not literally true in every detail, is substantially true in its implication, that is, that the "gist" or "sting" of the article, read as a whole, is true. (App. 4a.)

The opinion then holds that the judge at the *fourth trial* properly concluded that the "Nut Tree" allegations con-

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9. The cases cited by the Ninth Circuit in support of its technical holding of waiver are inapposite. Three cases involved multiple appeals by the *same* party. *Haynes v. United States*, 418 F.2d 1380 (Ct.Cl. 1969); *Calhoun v. Bernard*, 359 F.2d 400 (9th Cir. 1966); *Richardson v. Communications Workers of America*, 486 F.2d 801 (8th Cir. 1973) (appellant had cross-appealed from earlier judgment). Here petitioner has appealed only once, and the issues raised before the Ninth Circuit on this appeal contributed directly to the final judgment appealed. The Ninth Circuit's other "precedents" merely hold that *if* a party moves in the alternative both for judgment n.o.v. *and* a new trial, the trial court *must* dispose of both motions. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940); *Zimmerman v. Mathews Trucking Corp.*, 205 F.2d 837 (8th Cir. 1953); *Oberman v. Dun & Bradstreet, Inc.*, 507 F.2d 349 (7th Cir. 1974). These cases have no applicability to petitioner's appeal.

tained the "gist" or "sting" of the petitioner's article, and since these allegations were held false at the *second trial*, petitioner was not denied the right "to a trial and determination of the issue of the substantial truth of the gist of the article as a whole." (App. 6a.) This holding is rank error and tramples on both the First Amendment and due process.

Petitioner has *never* had a "trial and determination" of the factual issue of substantial truth or "gist" or "sting" of the article read as a whole. At the second trial the jury simply answered "yes" to the question, "Was the article false in one or more particulars?" after the judge instructed that the article must be found false in *one* particular—the "Nut Tree" meetings. (Point I, *supra.*) The judge at the fourth trial sat as both judge and trier of fact (the jury having been waived), but was bound by the Ninth Circuit's mandate on the first appeal to try "the sole issue of actual malice." (App. 15a.) The judge thus could not and did not try the factual issue of substantial truth or "gist" or "sting" of the article read as a whole.[10]

Thus, what the Ninth Circuit clearly meant was that the judge at the fourth trial concluded *sua sponte*, as a matter of law, that the untrue "Nut Tree" statements comprised the substance, or "gist" or "sting," of the article and that the article was therefore substantially false. This holding plainly violated petitioner's constitutional rights to a trial, *and to a trier of fact's determination*, of the *factual issue* of substantial truth or "gist" or

10. Both in his memorandum opinion and throughout the fourth trial, Judge Schwarzer repeatedly declared that the sole issue being tried was actual malice, pursuant to the Ninth Circuit's mandate. See, *e.g.*, pp. 333, 1007, 1448 of the trial transcript.

"sting" of the article read as a whole. Under the First Amendment, substantial truth is just as "essentially" a question of fact as is the issue of obscenity. See *Miller v. California*, 413 U.S. 15, 30 (1973); *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974).[11]

Assuming *arguendo* that the fourth trial judge could properly try and determine the factual issue of substantial truth, his conclusion was manifestly wrong. The four "Nut Tree" paragraphs (App. D at 18, col. 2) are an isolated excerpt and clearly do not "pervade" the article, anymore than the isolated nudity scenes pervaded the movie "Carnal Knowledge" held non-obscene by this Court in *Jenkins, supra*. The theme, or "gist" or "sting," of the article as a whole is summarized in the first two paragraphs (reproduced on p. 3, *supra*). Whether or not Alioto went to nighttime meetings at the Nut Tree restaurant with Fratianno and his associates could make no significant difference to anyone reading the 5,100 word article as a whole. If the "Nut Tree" statements were deleted entirely, only two "Cosa Nostra" figures would be removed from having contacts with Alioto (Frank LaPorte and Frank Bompensiero); Alioto's lengthy history of ties and relationships with five other Mafia figures described in the balance of the article would remain unchanged.[12]

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11. And see *United States v. Cutting*, 538 F.2d 835, 839 (9th Cir. 1976), *cert. denied* 429 U.S. 1052 (1977), where the Ninth Circuit held, applying *Miller*: "[T]he issue of obscenity must, in the first instance, be left to the trier of fact. . . ."

12. The balance of the article relates numerous contacts, relationships and dealings over the past 25 years between Alioto and five well known Mafia crime figures. Thus, the article states that (a) Jimmy Lanza, the Bay Area Mafia Chief, was both a client and a political supporter of Alioto; (b) Salvatore Marino and Angelo Marino, long considered Mafia members by law enforcement officers, received both business

(Footnote continued on following page)

III.

THE ACTUAL MALICE HOLDING WAS ARRIVED AT THROUGH A TOTALLY ERRONEOUS PROCESS.

The holding of actual malice below is constitutionally erroneous for two reasons: (1) it was reached solely by focusing on the isolated "Nut Tree" excerpt, and (2) it was based on an objective consideration and appraisal of a source, rather than a subjective analysis of the authors' actual state of mind.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court refused to sanction the first process used below—focusing on an isolated segment of a publication to find actual malice. Two specific statements in the *Times* advertisement were admittedly false (376 U.S. at 258-59) and the Secretary of the New York Times Company admitted knowledge that one statement was false. (*Id.* at 264.) This Court held that malice could not be based on knowing falsity of an isolated statement, when the larger publication of which the statement formed a part was "substantially correct" *or* when defendant believed in good faith that it was substantially correct. (*Id.* at 286.)

Here again, as with the issue of truth or falsity discussed in Point I, *supra*, it is clear that substantiality is the benchmark for measuring the protection of the First

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12. *continued*
and legal counsel from Alioto and supported him politically; (c) Emilio Giorgetti, long recognized as "old school" Mafia, was both a business partner and client of Alioto; and (d) Jimmy Fratianno, a notorious hoodlum and reputed Mafia "hit man," obtained loans totalling $105,000 from the First San Francisco Bank of which Alioto was founder and chairman of the board, after Fratianno personally visited Alioto's law office and after Alioto gave a favorable recommendation of Fratianno to the bank.

Amendment. By segmenting the article and focusing solely on the Nut Tree excerpt in finding actual malice, the district court clearly used an unconstitutional test; the correct test is knowledge or reckless disregard of substantial falsity of the article read as a whole. *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1112 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979); *Casano v. WDSU-TV, Inc.*, 464 F.2d 3, 4 (5th Cir. 1972); *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188, 192 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967).

In finding reckless disregard of truth of the Nut Tree segment, the trial judge used another test clearly contrary to *New York Times* and its progeny, *i.e.*, an objective determination of whether an informant should be believed. Thus, the judge stated there were "obvious reasons to doubt the veracity of the informant [Tommy Lee Thomas, son-in-law of Fratianno] [and] the accuracy of his reports." (App. 28a-29a.) Declaring that the "obvious reasons" to doubt Thomas' veracity outweighed the reasons that petitioner's editor and authors gave to support their belief of Thomas (App. 29a-31a), the judge concluded that the test of recklessness prescribed in *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) had been met, *i.e.*, that "the defendant in fact entertained serious doubts as to the truth of [the] publication." (App. 20a, 31a.)

This plainly constitutes an objective rather than subjective assessment; it cannot support or justify a finding of serious doubts actually entertained. If allowed to stand it will permit *St. Amant*'s requirement of subjective serious doubts to be met in future cases by lip service only, *i.e.*, a talismanic statement that there were "obvious reasons" to doubt the credibility of any given source.

This, we submit, clearly conflicts with the basic rationale of *St. Amant*, *New York Times* and other Circuits' decisions. *E.g.*, *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859 (5th Cir. 1978); *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Waskow v. Associated Press*, 462 F.2d 1173 (D.C. Cir. 1972).

CONCLUSION

For the reasons set forth above, we submit that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: October 16, 1980

APPENDIX A

Joseph L. ALIOTO, Plaintiff-Appellee,

v.

COWLES COMMUNICATIONS, INC.,

Defendant-Appellant.

No. 77-2999.

United States Court of Appeals,
Ninth Circuit.

July 21, 1980.

Appeal from the United States District Court for the Northern District of California.

Before BROWNING and TANG, Circuit Judges, and HOFFMAN,* District Judge.

BROWNING, Circuit Judge:

This is a diversity suit for libel brought by the ex-mayor of San Francisco against the publisher of LOOK Magazine. The suit is based on an article that appeared in LOOK in September 1969 entitled, "The Web that Links San Francisco's Mayor Alioto and the Mafia: A LOOK report on the private Joseph Alioto and his relationships with organized crime." The facts are set out in our previous opinion, 519 F.2d 777 (9th Cir. 1975), and in the most recent opinion of the district court, 430 F.Supp. 1363 (N.D.Cal. 1977).

This case has been tried four times. This is the second appeal. In the first trial the jury was unable to reach a verdict. In the second, the jury found the article defamatory and false in one or more particulars, but was

* Honorable Walter E. Hoffman, Senior United States District Judge, Eastern District of Virginia, sitting by designation.

unable to decide whether defendant published the article with "actual malice." The trial judge then weighed the evidence himself, concluded that plaintiff had not offered clear and convincing proof of actual malice, and entered judgment n.o.v. for defendant. Plaintiff appealed, contending there was sufficient evidence of malice to preclude judgment n.o.v. We agreed and "remanded for a new trial on the sole issue of actual malice." We did not consider the validity of the jury's special finding that the article was defamatory and false in one or more particulars because that finding was not challenged on appeal.

In the third trial, after remand, the jury was again unable to agree on the verdict. The fourth trial was to the court. The trial court found the "Nut Tree" allegations[1] "were made with actual malice, *i.e.*, with reckless disregard for their truth," 430 F.Supp. at 1371, and awarded plaintiff general damages in the sum of $350,000.

Defendant makes four contentions: (1) the judgment at the fourth trial was the product of prejudicial error committed in the second trial; (2) defendant was denied the right to a determination of the issue of substantial truth of the article as a whole as required by California law; (3) the finding of actual malice did not satisfy the First Amendment; and (4) the trial court erred in admitting certain evidence regarding damages.

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[1] The "Nut Tree" allegations were that plaintiff had a series of nighttime meetings at the Nut Tree restaurant with various Mafia leaders, including Jimmy "The Weasel" Fratianno; that at one meeting Fratianno said he was "excited" about future possibilities because "my man [Alioto]" controlled the board of directors of the First San Francisco Bank; that at another meeting Fratianno stated the plaintiff had assured him that he would be able to obtain loans from the bank; and that Fratianno "did not forget the promise." See note 2.

I.

Defendant argues that the jury found the LOOK article false in one or more particulars in the second trial only because the trial judge erroneously instructed the jury that the disputed "Nut Tree" allegations were false. Defendant asks us to overturn the judgment in the fourth trial because it rested upon this allegedly defective special finding of falsity in the second trial.

It is too late for defendant to challenge the second jury's finding. The arguments now raised should have been raised after the jury verdict, and on the first appeal. When defendant filed its motion for a judgment n.o.v, it should have moved in the alternative for a new trial on the ground that the jury should not have been instructed that the "Nut Tree" allegations were false. *See* Fed.R.Civ.P. 50(b). On the first appeal defendant should have argued that if the judgment n.o.v. were reversed the case should be remanded for a new trial on the issue of falsity as well as on the issue of malice because the instruction that led to the special verdict was in error. *See Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 253-54, 61 S.Ct. 189, 195, 85 L.Ed. 147 (1940); *Zimmerman v. Mathews Trucking Corp.*, 205 F.2d 837, 839 (8th Cir. 1953); *cf. Oberman v. Dun & Bradstreet, Inc.*, 507 F.2d 349, 353 (7th Cir. 1974).

Defendant not only failed to object to the special verdict in its post-trial motions or on appeal, but on remand accepted the second jury's finding without protest. Defendant submitted proposed jury instructions for the third trial that assumed the LOOK article had been determined to be defamatory and false in one or more particulars. Similarly, defendant's pretrial statement for the fourth trial proceeded on the assumption that the "Nut Tree" allegations had been found to be false and that the issue of falsity was not before the court.

By failing to challenge the special verdict on the earlier appeal and by acquiescing in the special verdict at the third and fourth trials, defendant waived any right to question the second jury's findings on this

appeal. *See, e.g., Richardson v. Communications Workers of America, AFL-CIO*, 486 F.2d 801, 803-05 (8th Cir. 1973); *Haynes v. United States*, 418 F.2d 1380, 1382 (Ct.Cl. 1969); *Calhoun v. Bernard*, 359 F.2d 400, 401 (9th Cir. 1966).

Defendant argues that we have discretion to consider the issue of falsity despite its failure to raise the issue earlier, citing *United States v. Fullard-Leo*, 156 F.2d 756, 757 (9th Cir. 1946), and *Verrilli v. City of Concord*, 557 F.2d 664 (9th Cir. 1977). Even if these decisions apply, defendant has suggested no reason why we should exercise our discretion except that "First Amendment issues are at stake." Litigants raising First Amendment issues are not for that reason alone excused from compliance with basic rules of orderly procedure.

The special verdict rendered at the second trial must stand. The fourth trial judge properly assumed that the Nut Tree allegations were false and defamatory.

II.

We turn to defendant's second argument. Under California law, defendant can defeat a libel action by proving that the allegedly libelous publication, although not literally true in every detail, is substantially true in its implication, that is, that the "gist" or "sting" of the article read as a whole, is true. *See Emde v. San Joaquin County Central Harbor Council*, 23 Cal.2d 146, 160, 143 P.2d 20, 28 (1943); *Kurata v. Los Angeles News Publishing Co.*, 4 Cal.App.2d 224, 227-28, 40 P.2d 520, 522 (1935). Defendant contends that by relying solely on the finding in the second trial that the "Nut Tree" allegations were false the trial court deprived defendant of its right to prove that the "gist" or "sting" of the article as a whole was substantially true.

The trial judge concluded that the theme of the article was that plaintiff connived with notorious criminals to obtain loans for a member of the Mafia, and the essence of this charge was found in the "Nut Tree" allegation:

The common thread of the defamatory matter complained of is represented by the allegations that plaintiff assisted Fratianno (an alleged Mafia leader] in obtaining loans from the First San Francisco Bank with knowledge of Fratianno's "criminality." Their substance is contained in the following paragraphs which include the so-called "Nut Tree meetings" allegations:

> Alioto was then organizing his First San Francisco Bank and seeking out future customers. He had also been thinking of entering politics for the first time. But despite encouragement from fellow Democrats to run for mayor in 1963, he rejected the opportunity because of "business obligations."
>
> Those obligations apparently included a series of nighttime meetings at the Nut Tree, a restaurant along the highway between San Francisco and Sacramento. Among those present at one or more of the conferences, in addition to Alioto, were Fratianno, Bompensiero, Angelo Marino, LaPorte and one of Jimmy Hoffa's top Teamster representatives on the West Coast. Alioto's plan to organize a bank was a subject of intense discussion.
>
> After one meeting, Fratianno said he was "excited" about the possibilities for the future because "my man [Alioto]" would control the bank's board of directors. Fratianno also expressed the belief that he would be able to buy a piece of the bank's stock. Later, after another meeting at the Nut Tree, Fratianno said Alioto was excluding him because of his hoodlum reputation but had assured him he would be able to obtain loans from the bank.
>
> The First San Francisco Bank opened its doors for business in July, 1964. Fratianno, still hungry for capital, did not forget the promise. Negotiations in San Francisco were arranged.

> On the morning of November 5, 1964, Fratianno and Angelo Marino met with Joseph Alioto at his 111 Sutter St. law offices to discuss Fratianno's finances. Alioto called the bank to set the loan wheels in motion.[2]
>
> * * * * * *
>
> As discussed above, the Nut Tree allegations pervade the article. They provide the thread with which Goldman [LOOK's Managing Editor] and the authors spin much of "the web of alliances with . . . the leaders of the Cosa Nostra" in which Alioto was said to be enmeshed. In this fashion, the article links Alioto, either directly or inferentially to various insidious activities of organized crime figures.

430 F.Supp. at 1367, 1371. We agree with the trial court's conclusion. Because the "Nut Tree" allegations contained the "gist" or "sting" of the article, and the truth of these allegations was fully tried and determined at the second trial, defendant has not been denied the right to a trial and determination of the issue of the substantial truth of the gist of the article as a whole.

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[2] The court dropped a footnote at this point reading "The previous trials established the so-called Nut Tree meeting allegations to be false and defamatory". Defendant argues that the allegation in the final paragraph of the court's quotation from the LOOK article regarding a meeting in plaintiff's office had not been found to be false at the earlier trials. We are satisfied from the district's court's discussion that the court decided the case on the premise that only the allegations relating directly to the Nut Tree meetings had been found to be false; (*see* 430 F.Supp. at 1369-71), and that court's inclusion of the final allegation in the quotation was inadvertent. The Court's only discussion of the allegation regarding the meeting in plaintiff's office was not that it had been found to be false in an earlier trial but rather that it had no evidentiary support and publication in the absence of such support was relevant to the issue of malice. See note 3 and related text at 430 F.Supp. 1371.

III.

Defendant's third argument is that the trial court's finding of actual malice must be set aside because (1) it was based on the court's conclusion as to defendant's state of mind with respect to the "Nut Tree" allegations rather than with respect to the whole article, and (2) it was based upon an objective test of malice rather than upon defendant's actual state of mind. As to the first, since the "Nut Tree" allegations contained the "sting" of the article, the district court properly inquired whether these allegations were published with malice. As to the second, it is beyond dispute that a trial judge may base a finding of subjective malice—that is, that the defendant "in fact entertained serious doubts as to the truth of his publication"—upon evidence that there were "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 1639, 60 L.Ed.2d 115 (1979), *quoting St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 1326, 20 L.Ed.2d 262 (1968). This is precisely what the district court did. *See* 430 F.Supp. at 1370.

IV.

Defendant's fourth and final argument is that the damage award was improper because the trial court: (1) permitted plaintiff to testify regarding statements made to him by third persons as to the impact of the article upon them; (2) permitted plaintiff to testify that publication of the article caused members of his family to suffer severe mental and emotional distress and apprehension; and (3) based his damage award on the harm caused by publication of the entire article and not just the false and defamatory "sting" of the article.

Under California law, evidence as to (1) and (2) appear to be inadmissible in a jury trial. *See Turner v. Hearst*, 115 Cal. 394, 47 P. 129 (1896); and *Stevens v. Snow*, 191 Cal. 58, 214 P. 968 (1923). However, while a trial judge sitting without a jury must base his verdict on competent evidence, he has broad discretion to

receive evidence that might be inadmissible in a jury trial (*see Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851, 863 (9th Cir. 1965); *Collins v. Owen*, 310 F.2d 884, 885-86 (8th Cir. 1962)); and there is no indication that the judge in this case relied upon the improper evidence in calculating the damage award. As to (3), in the usual case the "gist" or "sting" of the publication will be the source of damage, and there is nothing of substance to suggest the contrary was true in this case. The trial judge correctly stated the standards for determining damages in a libel suit, 430 F.Supp. at 1371-72, and the amount of the award was supported by properly admitted evidence.

Affirmed.

APPENDIX B

United States Court of Appeals for the Ninth Circuit
Filed Jun 23 1975

No. 73-1834

Joseph L. Alioto
Plaintiff-Appellant

vs.

Cowles Communications, Inc.
Defendant-Appellee

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: WRIGHT and CHOY, Circuit Judges, and EAST,* District Judge.

CHOY, Circuit Judge:

The September 23, 1969, issue of LOOK magazine contained an article entitled "The Web That Links San Francisco's Mayor Alioto and the Mafia: A LOOK report on the private Joseph Alioto and his relationships with organized crime." The article, written by two young employees of a San Francisco television station, accused Alioto of using his position as chairman of the board of a San Francisco bank to obtain loans for a trucking company run by James Fratianno, a convicted felon

* The Honorable William G. East, Senior District Judge for the District of Oregon, sitting by designation.

alleged to be a West Coast Mafia operative. The source of the information upon which this accusation was based was Fratianno's son-in-law, Tommy Thomas. Thomas claimed that Fratianno had told him of a number of meetings between Alioto and several underworld figures at the Nut Tree, a Bay Area restaurant. Thomas also claimed knowledge of connections between the Mafia and other prominent politicians. FBI and California law enforcement authorities were unable to corroborate the alleged meeting or other relationships between Alioto and the Mafia.

After agreeing to buy the article, LOOK editors had the authors interview Alioto. The authors asked Alioto about his connections with Fratianno, but did not tell him of their forthcoming Nut Tree accusations. When Alioto later learned that an article was to be published, he demanded, in a series of telegrams, a meeting with LOOK editors. LOOK officials replied that such a meeting would serve no useful purpose, since the story had already been sent to the printers.

Alioto responded by filing a libel suit in federal district court against LOOK's publisher, Cowles Communications, Inc. The first trial ended in a hung jury. On retrial, the jury returned a special verdict, finding that the article was false and that it was defamatory. The jury was unable to agree whether the article had been published with the requisite actual malice, however.

Despite this inconclusive verdict, the district judge awarded judgment to Cowles. He held that a finding of actual malice by both judge and jury was required in order for Alioto to recover, and that he found that actual malice "was not shown with convincing clarity." Therefore, he granted Cowles' motion for judgment n.o.v. Furthermore, he found that Alioto was entitled only to special damages because he had not complied with the requirements of Cal. Civ. Code § 48a by demanding a retraction within 20 days of publication; Alioto had demanded only general and punitive damages, so the judge granted Cowles' motion for summary judgment.

Alioto appeals. We reverse and remand for a new trial on the issue of actual malice.

Retraction

California permits a publisher or broadcaster to escape liability for general damages in a libel suit if he publishes or broadcasts a retraction upon proper demand:

> 1. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

Cal.Civ.Code § 48a(1).

On its face, section 48a does not apply to magazines. One division of the California Court of Appeal has held explicitly that magazines are not covered by either the letter or the rationale of section 48a. *Morris v. National Federation of the Blind*, 192 Cal.App.2d 162, 13 Cal. Rptr. 336 (1961). Other divisions have applied section 48a to magazines without apparent notice that the statute specifies libels in newspapers, not all printed media. *Shumate v. Johnson Publishing Co.*, 139 Cal.App. 2d 121, 293 P.2d 531 (1956); *Harris v. Curtis Publishing Co.*, 49 Cal.App.2d 340, 121 P.2d 761 (1942).

The California Supreme Court has added to the confusion in an opinion applying section 48a to the Reader's Digest. *Briscoe v. Reader's Digest Association*, 4 Cal.3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971). In two sentences near the end of a long opinion, the *Briscoe* court stated only that the plaintiff had not complied

with the requirements of section 48a, and thus was limited to recovery of special damages. The court did not discuss the contrary decision in *Morris*, nor the fact that it was construing "newspaper" to include magazines.

In a case decided this year, a division of the Court of Appeal has refused to acknowledge *Briscoe* as requiring extension of 48a to publishers of magazines. *Montandon v. Triangle Publications, Inc.*, 45 Cal.App.3d 938, 120 Cal. Rptr. 186 (1975). The *Montandon* court carefully analyzed the judicial history of the issue, observing that *Morris* had been the only reasoned decision to date. The court observed that section 48a(3) requires that a retraction be published within three weeks of the demand. While publication within this time would have been possible for the weekly magazine involved in the *Montandon* litigation, the *Montandon* court was unwilling to adopt a construction of the statute which would require a distinction between weekly and biweekly magazines on the one hand and monthly magazines on the other. The court also emphasized the validity of the distinction made in *Morris* between newspapers and broadcast media, which are under pressure to disseminate "news while it is new," and magazines, which have the advantage of greater leisure in which to ascertain the truth of accusations before publishing them. Finally, in examining the legislative history of section 48a, the *Montandon* court observed that the statute originally applied only to newspapers, but had been amended in 1945 and again in 1949 to extend coverage to radio and then to television. The legislature had not seen fit, however, to amend the statute again in 1961 following the *Morris* decision in order to extend coverage explicitly to magazines.

We find the reasoning presented by the *Montandon* opinion persuasive. The California Supreme Court has declined to review *Montandon*. Although this action does not of itself indicate approval of the *Montandon* decision, we conclude that if it were confronted with the issue it would decide that, notwithstanding its decision in

Briscoe, section 48a's requirement of a demand for retraction does not extend to libels appearing in magazines. Therefore, we reverse the district court's judgment that Alioto's claim was limited to special damages and that, having claimed no special damages, he was entitled to no relief.

Actual Malice

In order to recover damages for publication of libelous statements relating to official conduct, a public official must establish that the defendant published the falsehood with actual malice—"that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, (1964). "Reckless disregard" does not refer to an objective "reasonable man" standard. The defendant must be proved to have subjectively "entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). To protect first amendment values, the Court requires a higher standard of proof than the usual "preponderance of the evidence"; the recklessness must be demonstrated by "clear and convincing proof." *See e.g., Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 30 (1971). Because of the importance of the interests in freedom of speech and press which are at stake, a court must review the facts to determine whether the jury applied the proper standard; simply ascertaining that the jury was properly instructed does not suffice. *New York Times*, 376 U.S. at 285; *Rosenbloom*, 403 U.S. at 55.

In his opinion granting Cowles' motion for judgment n.o.v., the district judge stated that a jury could justifiably find that the evidence proved with convincing clarity that the libel was published either with or without actual malice. He then weighed for himself the persuasiveness of the evidence and the credibility of witnesses, took into account that Alioto had twice failed to convince a jury of Cowles' actual malice, and decided that Alioto had failed to establish actual malice.

The court thus implied that a plaintiff in a libel action must persuade two triers of fact: both judge and jury. Judge Skelly Wright has stated the proposition:

> [T]he trial court, at the close of the plaintiff's case must decide whether actual malice has been shown with 'convincing clarity.' In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence. If the trial is permitted to proceed, the court will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence. If the motion for a directed verdict at this stage of the trial is denied, the actual malice issue, along with the other issues, is then submitted to the jury under the *Times* instruction without any indication from the court or counsel that the court has decided that the evidence shows actual malice with 'convincing clarity.'
>
> This two-step procedure in which both the trial judge and the jury must find actual malice before there can be judgment for the plaintiff provides the protection of the First Amendment freedom that *Times* sought to make secure in areas of public concern."

Wasserman v. Time, Inc., 424 F.2d 920, 922-923 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970) (Wright, J., concurring); *see Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

Following the district court's decision, however, we repudiated Judge Wright's two-step approach in *Guam Federation of Teachers, Local 1581 v. Ysrael*, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974). A district judge on motion for judgment n.o.v., or an appellate judge on review, must examine the evidence to see whether, if all permissible inferences were drawn in the plaintiff's favor and all questions of credibility were resolved in his behalf, the evidence then would demonstrate by clear and convincing proof that the libelous material was published with actual malice. Once this

question has been resolved in the plaintiff's favor, the jury's findings as to those inferences and as to witness credibility are determinative.

The district court, while granting Cowles' motion for judgment n.o.v., found that:

> Judging the whole matter objectively on the whole record I think that a jury justifiably could find that the evidence showed with convincing clarity that the authors (and as of the date of publication their states of mind could be imputed to defendant) were ambitious young men, anxious to sell a sensational story to a national magazine; that the Tommy Thomas statements as to the Nut Tree meetings added greatly to the sensational nature and salability of the article; that the authors must have had doubts about the veracity of Tommy Thomas (the sole source of the Nut Tree statements); that they deliberately failed to cross-check on the validity of his statements because they did not want to find them to be untrue, and so published the statements with a reckless disregard for truth.

Our review of the record convinces us that the district judge fairly summarized the permissible inferences which a jury might draw from the evidence. Having found the evidence that LOOK's editors entertained doubts as to the truth of the Nut Tree allegations to be sufficiently clear and convincing in nature were the jury to decide questions of credibility and draw permissible inferences in Alioto's favor, the court was without power to award Cowles judgment notwithstanding the jury's failure to arrive at a verdict. The judgment must be reversed and the case remanded for a new trial on the sole issue of actual malice.

Reversed and Remanded.

APPENDIX C

Original Filed
May 3 1977

Clerk, U.S. Dist. Court
San Francisco

United States District Court
Northern District of California
NO. C-52150-WWS

Joseph L. Alioto,
Plaintiff,

v.

Cowles Communications, Inc.,
Defendant.

JUDGMENT

This case having been tried to this Court sitting without a jury, and the Court having made its findings of fact and conclusions of law, and good cause appearing therefore:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff Joseph L. Alioto recover of defendant Cowles Communications, Inc., the sum of $350,000, plus plaintiff's costs of suit.

DATED: May 3, 1977

WILLIAM W SCHWARZER
United States District Judge

Original Filed
May 3 1977

Clerk, U.S. Dist. Court
San Francisco

United States District Court
Northern District of California
NO. C-52150-WWS

Joseph L. Alioto,
Plaintiff,

v.

Cowles Communications, Inc.,
Defendant.

MEMORANDUM OF OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action for libel in which plaintiff seeks damages for defamatory statements contained in an article published by defendant's Look Magazine in September, 1969, while plaintiff served as Mayor of San Francisco. This Court has jurisdiction under 28 U.S.C. § 1332(a).

The prior history of this litigation is summarized in the opinion of the Court of Appeals in *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777 (C.A. 9, 1975). The first trial ended in a hung jury. At the second trial the jury returned a special verdict finding the article false in one or more particulars and defamatory, but reached no agreement on the issue of actual malice. The trial judge granted defendant's motion for judgment n.o.v., but the Court of Appeals reversed and remanded "for a new trial on the sole issue of actual malice." The third

trial which followed again ended in a hung jury. The action came on for a fourth trial before this Court commencing March 21, 1977, both parties having waived the jury.

The Court, after considering all of the evidence and the arguments of counsel, finds and concludes, for the reasons hereafter discussed, that plaintiff has sustained the burden of proving by clear and convincing evidence that defendant published the defamatory statements contained in the article with actual malice, that is, with reckless disregard for whether they were true or not, and is entitled to judgment in the sum of $350,000.00, plus costs.

I.

Inasmuch as plaintiff was a public official when the article was published, this case is controlled by the rule of *New York Times Co. v. Sullivan*, 376 U.S. 254, 280-281 (1963), which

> "prohibits a public official from recovering damages for a defamatory falsehood relating to his offical conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court explained that this rule

> "protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, *anything which might touch on an official's fitness for office is relevant.*" (379 U.S. at 77, emphasis added.)

Under the *New York Times* rule, evidence of malice must be clear and convincing to satisfy the Constitutional standard under the First Amendment. Evaluation of evidence under this rule confronts the Court with the difficult task of resolving in each case the tension between society's interest in free speech and the

individual's interest in his reputation. See, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-343 (1974).

It is settled that failure to investigate or in other respects to use due care in publishing false statements about public officials does not meet the test. See, *New York Times Co. v. Sullivan, above*, 376 U.S. at 287; *Beckley Newspaper v. Hanks*, 389 U.S. 81, 84-85 (1967). Conversely, proof of actual knowledge of falsity is not required. In *St. Amant v. Thompson*, 390 U.S. 727 (1968), the Supreme Court elaborated on the *New York Times* rule and provided guidelines which are dispositive of this case. That was an action for libel brought by a deputy sheriff whom defendant had charged with accepting bribes. The Court, in applying the *New York Times* malice standard, said:

> " 'Reckless disregard,' it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be worked out through case-by-case adjudication . . . " (390 U.S. at 730)

The Court explained that

> "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." (390 U.S. at 731)

The Court's opinion then elaborated on the application of this standard to a defamatory publication:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated

by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, *recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.*" (390 U.S. at 732, emphasis added.)

With these controlling principles in mind, the Court now turns to the evidence of malice in this case.

II.

Under the title "The Web That Links San Francisco's Mayor Alioto and The Mafia", defendant's Look Magazine published an article purporting to be a "report on the private Joseph Alioto and his relationship with organized crime." The article was written by Richard Carlson and Lance Brisson who sold it to Look. According to defendant, the "sting" or theme of the article is reflected in its first and last paragraphs which state:

"Mayor Joseph L. Alioto of San Francisco, the rising politician who came close to the Democratic nomination for the Vice Presidency in 1968, is enmeshed in a web of alliances with at least six leaders of La Cosa Nostra. He has provided them with bank loans, legal services, business counsel and opportunities, and the protective mantle of his respectability. In return, he has earned fees, profits, political support and campaign contributions.

"A lengthy investigation by LOOK reveals that some of these links between Alioto and the underworld go back almost a quarter of a century. They have not been broken.

* * *

"Alioto's law firm, in which he still retains an interest, continues to represent the Marinos and the

> California Cheese Co. His brother-in-law, Papale, remains in frequent friendly contact with Angelo Marino. The latter talks regularly with Bompensiero, who still sees LaPorte. An so on. Mayor Joseph Alioto's channels of communication with the Cosa Nostra remain open."

Defendant's purpose was to raise questions concerning plaintiff's fitness for public office on the basis of his alleged relationship to organized crime.

The heart of the article—and the subject which provided the impetus for the authors' investigation—was a series of loans made by the First San Francisco Bank in 1965 to one James Fratianno. Plaintiff was a founder and a shareholder of that bank and served as chairman of its board of directors; plaintiff's law firm appears also to have performed some legal services for it. The loans were made in 1965, two years before plaintiff was first elected mayor. It is alleged in the article that Fratianno, described as "the chief executioner for the Mafia on the West Coast", had been involved in various crimes, including rape, extortion, armed robbery, fraud and bookmaking, over a period of 35 years. Much of the article is devoted to the nefarious activities of Fratianno and his alleged underworld associates.

The common thread of the defamatory matter complained of is represented by the allegations that plaintiff assisted Fratianno in obtaining loans from the First San Francisco Bank with knowledge of Fratianno's "criminality". Their substance is contained in the following paragraphs which include the so-called "Nut Tree meetings" allegations:

> "Alioto was then organizing his First San Francisco Bank and seeking out future customers. He had also been thinking of entering politics for the first time. But despite encouragement from fellow Democrats to run for mayor in 1963, he rejected the opportunity because of "business obligations."

"Those obligations apparently included a series of nighttime meetings at the Nut Tree, a restaurant along the highway between San Francisco and Sacramento. Among those present at one or more of the conferences, in addition to Alioto, were Fratianno, Bompensiero, Angelo Marino, LaPorte and one of Jimmy Hoffa's top Teamster representatives on the West Coast. Alioto's plan to organize a bank was a subject of intense discussion.

"After one meeting, Fratianno said he was 'excited' about the possibilities for the future because 'my man [Alioto]' would control the bank's board of directors. Fratianno also expressed the belief that he would be able to buy a piece of the bank's stock. Later, after another meeting at the Nut Tree, Fratianno said Alioto was excluding him because of his hoodlum reputation but had assured him he would be able to obtain loans from the bank.

"The First San Francisco Bank opened its doors for business in July, 1964. Fratianno, still hungry for capital, did not forget the promise. Negotiations in San Francisco were arranged.

"On the morning of November 5, 1964, Fratianno and Angelo Marino met with Joseph Alioto at his 111 Sutter St. law offices to discuss Fratianno's finances. Alioto called the bank to set the loan wheels in motion."[1]

The theme of these paragraphs recurs in many variations throughout the text of the article and in the captions of a full page diagram entitled "The Web of Relationships" showing plaintiff's picture in the center of a web connecting him with various persons reputed to be Mafia figures. Thus the article states, *inter alia*, that Alioto "personally arranged for the loans after several meetings with Fratianno and other Mafia leaders," that

[1] The previous trials established these so-called Nut Tree meeting allegations to be false and defamatory.

he "had to have known of [Fratianno's] criminality", that Alioto had "vouched for "Fratianno]", that Alioto "made 'at least a dozen' long-distance calls to Fratianno", and that when Fratianno defaulted, "strangely, unlike most of Fratianno's other creditors, Alioto's bank never sued for damages or recovery of the debt."

The general allegation linking plaintiff with the Fratianno loans derived from information received by the authors from a law enforcement source responsible for investigating organized crime in Northern California. That information disclosed that the Fratianno Trucking Company had obtained a series of five loans from the First San Francisco Bank to purchase trucks and related equipment, secured by title to the equipment. Some of the loans were made after a bank officer had learned that Fratianno had a criminal record. In this connection, the authors were also told that Angelo Marino and Fratianno had been observed, shortly before the first loan was made, entering the office building at 111 Sutter Street, where the Alioto law firm had its offices, and may have visited those offices. The authors had no information, however, that plaintiff had met with them. According to their law enforcement source, a bank officer had stated, concerning plaintiff's role in the making of the loan, that Fratianno "was brought to the bank by 'Joseph Alioto, who is a client of the bank and a well-known attorney'. [The bank officer] also said that . . . while Alioto did not vouch personally for Fratianno's credit he did say 'his credit is considered good by all with whom he has done business.'"

In an attempt to develop the Fratianno loan story, Richard Carlson contacted one Tommy Lee Thomas, who, until 1966, had been Fratianno's son-in-law and business associate. Carlson had seen Thomas' name on loan documents at the First San Francisco Bank and on Public Utilities Commission papers relating to the Trucking Company. Carlson learned that Thomas had cooperated with the government in a prosecution of Fratianno for underpaying his truck drivers, and had been considered truthful by the agent in charge of that

case. Carlson also knew that FBI agents in the Sacramento area had spoken to Thomas from time to time, but made no inquiries regarding Thomas' reputation for reliability. When Carlson met Thomas in Sacramento around July 2, 1969, Thomas requested anonymity before consenting to an interview and was assured that his statements would not be attributed.

In a lengthy interview with Carlson that day, Thomas related conversations he had had five years earlier with Fratianno during which Fratianno had told Thomas of meetings at the Nut Tree restaurant with Alioto and a group of persons, including Frank Bompensiero, Frank LaPorte, Angelo Marino and Jack Goldberger. LaPorte, Bompensiero and Marino are described in the article as major figures in organized crime. They represent three of the six crime figures with which plaintiff, according to the article, is linked in "a web of alliances." This was the only information the authors had received linking Alioto with Bompensiero and LaPorte. Goldberger is an official of the Teamsters Union. The discussion at the meetings, according to Thomas, concerned a bank Alioto was starting which he wanted his friends to help him control. At a later meeting Alioto was said to have told Fratianno he would have to be excluded because of his bad reputation but would be able to borrow money from the bank.

Thomas also claimed to have spoken to Alioto on the telephone at least a dozen times while he was at the Trucking Company. And he described contacts which Fratianno claimed to have had with various political figures, including an alleged payoff to the Governor of California.

Immediately after the interview Carlson prepared a summary, ten single-spaced pages in length. A day or two later, Martin Goldman, Look's managing editor who was responsible for the article, met with the authors in San Francisco. They discussed the progress of the investigation and the prospects for producing an article for publication. At that point, defendant had advanced some expense money to the authors but had not yet com-

mitted itself to purchase the article. It was decided that Carlson would meet Thomas once more and tape record the interview. They met a few days later.

The transcript of the tape recording of the second Thomas interview, and Carlson's recollection of it, reflect that Thomas generally adhered to his previous statements, but with such qualifications as "I'm just guessing, because it's so long ago. It's pretty hard to remember all that stuff . . ." Thomas said that he just guessed at the number of Nut Tree meetings and could not fix the time when the meetings took place. When questioned about which persons were present at the meetings, Thomas replied that he didn't think "Bump" (Bompensiero) was at every meeting, "and it would be hard to say about Alioto, I would assume that Alioto was at every meeting, because, what the hell, he was the guy that had something that they wanted."

Following the second Thomas interview, the authors prepared a draft of the article including the substance of the Nut Tree charges and sent it to Goldman near the end of July. Goldman then met with the authors once more and agreed to purchase the article. Thereafter, in frequent consultation with the authors, he made extensive editorial changes, the general effect of which was to expand and sharpen the tone of the references in the article to Alioto's connections with persons alleged to be known to him as criminals.[2]

The first attempt to corroborate the reports of the Nut Tree meetings was made in early August when Carlson contacted an FBI agent charged with local responsibility for following organized crime activity who had

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[2] These changes appear on Exhibit 3a in Goldman's handwriting. Goldman testified that they were changes made by mutual agreement with the writers and that the fact they were in his handwriting did not necessarily indicate that he was their author. Whoever may have been the originator of any particular change, however, the volume and substance of the revisions made in his handwriting establish the depth of his involvement in the preparation of the article for publication.

theretofore been his principal source of information for the article. This agent advised that he had no information of any such meetings. Subsequently Lance Brisson, the other author, sought corroboration from an employee of a state law enforcement agency responsible for investigating organized crime activity who had also been an important source for the article; he advised that the report of the meeting was "ridiculous."

Late in August, the authors had a lengthy interview with plaintiff. Although they did not ask him directly about the Nut Tree meetings, they did ask him whether he knew LaPorte or Bompensiero, which plaintiff denied. Plaintiff further described the nature of his relationships with the other alleged underworld figures mentioned in the article. These relationships involved intermittent legal representation of the Marinos, Lanza and Emilio Georgetti, not all of it by Alioto himself. The only relationships of Alioto bearing on the subject of the article, other than through legal representation, were an interest in the Regal Packing Co., which had a business relationship with the Marino's California Cheese Co., and participation a number of years ago in the purchase of the Castlewood Country Club, with which Georgetti had had a connection. Beyond that, plaintiff had relationships with some persons, such as his brother-in-law, who in turn were alleged to have had relationships with organized crime figures, apparently unrelated to plaintiff. With respect to the Fratianno loans, plaintiff explained that he had met Fratianno once when Goldberger brought him to Alioto's Rice Growers Association office and introduced him. Fratianno wanted help in obtaining a contract for the bulk hauling of rice and a bank loan. Plaintiff's only responsive action was to telephone the bank, which was then newly founded and actively looking for borrowers, introduce Fratianno as a prospective borrower and advise the bank officer that any loan to him should be made on the merits.

Following the Alioto interview, Brisson telephoned Goldberger who denied attending meetings with the per-

sons allegedly at the Nut Tree meetings. He indicated reluctance to discuss the matter over the telephone, but offered to meet Brisson at his office and answer questions. Brisson made no attempt to see Goldberger.

The question before the Court is whether the foregoing evidence, in the light of the record as a whole, establishes with convincing clarity that defendant published the article with reckless disregard for its truth or falsity.

III.

The Nut Tree allegations, together with the related allegations contained in the article of which plaintiff complains, charge plaintiff with having secretly and knowingly connived with notorious criminals to provide them with bank loans for business activities controlled by organized crime.

While Carlson and Brisson prepared the article in draft form, the final version was the product of joint efforts by the authors and Goldman. There is no dispute that the authors fully shared their knowledge and information with Goldman, that he was informed of the sources for the material statements in the article, and that he participated actively and at length in the preparation of the final text. Defendant does not contend that the authors withheld facts from Goldman relevant to the issue of defendant's malice, or that any gap of information existed between them and Goldman. Hence, it is not disputed that the malice issue must be decided on the basis of whether there is clear and convincing evidence that Goldman entertained serious doubts as to the truth of the publication.

Goldman has testified that he believed these allegations and charges to be true but the Court must determine from all of the evidence "whether the publication was indeed made in good faith." *St. Amant v. Thompson*, above, 390 U.S. at 732.

Defendant argues that Goldman had formed a reasonable and good faith belief in Thomas' trust-

worthiness. But that belief did not arise from any objective facts known about Thomas' background, or from any prior experience with him as an informant. Goldman testified that he and the authors felt that Thomas had told the truth because he had no motivation to lie to Carlson. There were, however, obvious reasons for him to doubt, if not Thomas' veracity, certainly the accuracy of his report, given its hearsay nature, the time which had passed since the alleged events had taken place, and the general tenor of the Thomas interviews, including the farfetched claims of Fratianno and the vague state of Thomas' memory.

Thomas' trustworthiness, in any event, cannot rise higher than Fratianno's. Thomas did not claim to have personal knowledge of the Nut Tree meetings; he simply repeated what he claimed Fratianno had told him. In weighing the credibility of the Thomas report, Goldman had to consider that it was based on statements by Fratianno whom he regarded as a notorious hoodlum who could not be trusted, a "liar" and a "name dropper." Goldman had also to consider that both federal and state law enforcement sources told the authors they had no information of any such meetings. Their inability to corroborate the report was necessarily significant to Goldman who knew that these sources were directly involved in investigations of organized crime, that the activities of certain of the figures involved in the Nut Tree meetings were of interest to them, and that Fratianno was in fact under occasional surveillance by one of the agencies at the time. In addition, Goldman knew that Thomas had been in contact with the FBI, yet had apparently never reported the alleged Nut Tree meetings.

Taking into consideration the nature and substance of the reports, the quality of their source, the passage of time since the original statements were said to have been made, and the complete absence of corroboration from law enforcement agencies who for several reasons would have been expected to have received some information about the meetings, the Court is compelled to conclude that there were "obvious reasons to doubt the

veracity of the informant [and] the accuracy of his reports."

Defendant contends that the Thomas information was credible because it was "self-confirming", in that it referred to the formation of the bank and the making of the loans. Moreover, defendant argues, the Nut Tree meetings fit into a pattern of information relating to Alioto's connection with the Fratianno loans.

Thomas of course had an independent source of information about the bank inasmuch as the Fratianno Trucking Company had received loans from it. The other information which the authors had received concerning Alioto's part in the making of the loans did not provide a basis for any inference of improper activities or purposes. In particular, the authors had received no information that Alioto had met with Marino or anyone else other than Goldberger and Fratianno, on the occasion described above, to talk about the loan. A leap from this information to the charge of a night-time cabal with major hoodlums to provide the financial wherewithal for underworld business activities is too great to be performed without obvious reasons for doubt.[3]

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[3] As pointed out above, the authors and Goldman also had information that shortly before the loans were made, Fratianno and Marino had been in the offices of the Alioto law firm. But they had no information to substantiate the statement in the article that Marino and Fratianno met with Alioto and discussed Fratianno's finances. Nor did they have any information to warrant the inference raised by the statement in the article that "Strangely, unlike most of Fratianno's other creditors, Alioto's bank never sued for damages or recovery of the [Fratianno] debt." On the contrary, they had information that the bank was in the process of collecting most of the debt. They knew, moreover, that before the loans were made Fratianno had filed a financial statement with the bank showing his net worth to be $243,066.99—nonetheless, the article states: "As for his 'credit', Fratianno was a disastrous risk." These facts, together with the absence of information reflecting any questionable activities by plaintiff, further undermine the claim of "self-confirmation".

Defendant's argument is also undercut by the fact that the authors and Goldman chose not to seek corroboration from the most obvious source, Jack Goldberger whom the article charges neither with criminal activity nor with an interest disqualifying him as a reliable source. Yet he, aside from plaintiff, was the only other available percipient witness to the alleged meetings. To the extent he was asked pertinent questions in the telephone call from Brisson, he denied the author's assertions. But he was never asked directly about the Nut Tree meetings and his offer to answer questions at his office was not taken up. While *New York Times* imposes no liability for failure to verify the accuracy of reports, the failure to pursue what appears to have been the most obvious available source of possible corroboration must, under all of the circumstances of this case, be regarded as clear and convincing evidence of reckless disregard for the truth.

As for the authors' interview with plaintiff, while they avoided asking him about the Nut Tree meetings, they did obtain a flat denial of his knowing either LaPorte or Bompensiero, key participants in these meetings, and they received explanations of his relations with other figures mentioned in the article which refuted the inferences and implications of the article. At the trial, Goldman and the authors took the position that, with respect to the subject matter of the article, it was their conclusion that Alioto had lied while Thomas and Fratianno had told the truth. In light of all of the evidence discussed above, and Goldman's admission that, while Fratianno was a "liar", Alioto, so far as he knew, had never been implicated in any criminal activity or misused his office or position to shield or promote crime, the Court must conclude that Goldman's belief could not have been held in good faith.

As discussed above, the Nut Tree allegations pervade the article. They provide the thread with which Goldman and the authors spin much of "the web of alliances with . . . the leaders of the Cosa Nostra" in which Alioto was said to be enmeshed. In this fashion, the article

links Alioto, either directly or inferentially to various insidious activities of organized crime figures. These allegations have heretofore been found to be false and defamatory. The Court now finds that they were made with actual malice, i.e., with reckless disregard for their truth.

IV.

Plaintiff has asked for no special damages but seeks to recover general damages in the sum of $500,000.00 as well as punitive damages in an amount deemed appropriate by the Court.

General damages include damages for "loss of reputation, shame, mortification and hurt feelings." Cal. Civil Code, § 48a 4.(a). "In actions for libel or slander the amount of damages recoverable is peculiarly within the discretion of [the trier of fact], for there can be no fixed or mathematical rule on the subject." *Behrendt v. Times-Mirror Co.*, 30 C.A.2d 77, 90, 85 P.2d 949 (1938) (hearing denied). "The [plaintiff] is not required to prove, and in the nature of things cannot prove, the extent to which he has been damaged by this libel . . . [the trier of fact] may consider as a basis for its award of actual damages . . . the wide publicity given to the libel, the plaintiff's prominence in the community where he lives, his professional standing, his good name and reputation, his injured feelings and his mental sufferings." *Scott v. Times-Mirror Co.*, 181 Cal. 345, 365, 184 P. 672 (1919).

There is no dispute that the charge made in the article, impugning plaintiff's fitness for public office or other positions of trust, is a grave one. Plaintiff has testified without contradiction to the apprehension and severe mental and emotional distress it has caused, and will continue to cause him and his family.

Plaintiff is a prominent member of the San Francisco community and of the legal profession. His good name and reputation are unquestioned. He has also gained a national reputation, both because of his prominence in the Democratic Party in which he has played a national

and statewide role, and his statute as a leading antitrust lawyer. Thus, the nationwide—and to some extent worldwide—dissemination of the article, over 8 million copies of which were published, inevitably caused widespread harm to his reputation.

Plaintiff was, moreover, particularly vulnerable to the kinds of allegations made in the article for two reasons. First, because of his Italian descent, plaintiff was susceptible to being associated in the public mind with what the article liberally refers to as the Costa Nostra and the Mafia and those of their alleged members who also bear Italian names. Second, because having represented persons charged with crimes, some of whom also had alleged connections with organized crime, he suffered the lawyer's vulnerability to that public sentiment which often tends to identify the lawyer invidiously with his client. The article in fact invites the reader to make that very identification.[4]

In partial mitigation of damages, consideration must be given to plaintiff's ready access to the media which enabled him to have a point-by-point denial of the Look charges published in the local press concurrently with the article's publication. Plaintiff was able to make a statewide broadcast to deny the charges and the denials were also carried by national wire services. Although plaintiff's access to self-help is relevant, it does not undo

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[4] See the opinion of Chief Justice Burger dissenting (on unrelated grounds) in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 355 (1974):

> "The petitioner here was performing a professional representative role as an advocate in the highest tradition of the law, and under that tradition the advocate is not to be invidiously identified with his client. The important public policy which underlies this tradition—the right to counsel—would be gravely jeopardized if every lawyer who takes an 'unpopular' case, civil or criminal, would automatically become fair game for irresponsible reporters and editors who might, for example, describe the lawyer as a 'mob mouthpiece' for representing a client with a serious prior criminal record . . ."

the damage for each denial necessarily involves a republication of the original libel and merely lets the reader make his choice. See, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

Taking into account all of the foregoing factors, and viewing them in the light of the record as a whole, the Court determines that plaintiff shall recover general damages in the sum of $350,000.00.[5]

Plaintiff's claim for punitive damages is rejected. While there is abundant evidence of actual malice within the meaning of *New York Times Co. v. Sullivan*, above, there is no substantial evidence that defendant had a "state of mind arising from hatred or ill will toward plaintiff", as required by Civil Code § 48a(d). See, *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 95 S.Ct. 465, 469-470 (1974).

The foregoing shall constitute the Court's findings of fact and conclusions of law.

IT IS SO ORDERED.

DATED: May 3, 1977.

WILLIAM W SCHWARZER
United States District Judge

[5] In an affidavit filed shortly before the fourth trail, defendant stated that up to that time it had incurred costs of defense in excess of $600,000. This figure gives some indication of the cost of the litigation to both parties. While the Court, in fixing the amount of damages awarded plaintiff, has not taken those costs into account, the reasonableness of that amount is corroborated by consideration of the expense plaintiff has had to incur to achieve the vindication to which he is entitled and which only a favorable judgment affords.

THE WEB THAT LINKS

SAN FRANCISCO'S MAYOR ALIOTO AND THE MAFIA

A LOOK report on the private Joseph Alioto and his relationships with organized crime

BY RICHARD CARLSON AND LANCE BRISSON

MAYOR JOSEPH L. ALIOTO of San Francisco, the rising politician who came close to the Democratic nomination for the Vice Presidency in 1968, is enmeshed in a web of alliances with at least six leaders of La Cosa Nostra. He has provided them with bank loans, legal services, business counsel and opportunities, and the protective mantle of his respectability. In return, he has earned fees, profits, political support and campaign contributions.

A lengthy investigation by LOOK reveals that some of these links between Alioto and the underworld go back almost a quarter of a century. They have not been broken.

Joseph Lawrence Alioto is a political phenomenon. A relative unknown when he took office 20 months ago, he shot to national prominence almost immediately. Following his powerful speech nominating Hubert Humphrey at the Democratic convention, Alioto returned to California as the state's leading Democrat. He is now preparing to challenge Republican Ronald Reagan for the governorship next year.

Bald but still youthfully bull-shouldered, the 53-year-old Alioto is the only son of a Sicilian fish merchant who immigrated with his family to San Francisco at the turn of the century. The Mayor, who made millions as a businessman and noted antitrust lawyer, proudly recalls his family's early struggles. His life-style, however, is radically altered from what he knew in the years of poverty. He drives a black Rolls-Royce, prefers expensively tailored dark suits and lives in a luxurious home in an elegant neighborhood. His language is polished and uttered with insistent authority. Expressive gestures invariably emphasize the important points.

But the public Joseph Alioto bears little resemblance to the private Joseph Alioto whose name appears on dozens of pages of law-enforcement intelligence reports in California and Washington. These reports and LOOK's investigation detail a number of the relationships between Alioto and organized crime.

DURING A TEN-MONTH PERIOD IN 1965, a notorious Cosa Nostra killer, Jimmy "The Weasel" Fratianno, received a series of loans totaling $105,000 from the First San Francisco Bank. The chairman of the board of directors and one of the founders of the bank was Joseph Alioto. In fact, it was Joseph Alioto who personally arranged for the loans after several meetings with Fratianno and other Mafia leaders.

The Weasel is not someone usually invited home for dinner—or into a bank for a loan. Testifying in 1958 before the California State Assembly Rackets Investigating Subcommittee, Capt. James E. Hamilton, head of the Los Angeles Police Department Intelligence Unit, said: "He (Fratianno) had long been ...considered by us to be the chief executioner for the Mafia on the West Coast. I have heard as high as 16 deaths attributed to Fratianno." State and Federal authorities believe now that he has graduated from the "muscle" role to that of the most influential and active Mafioso along the Pacific Coast. His avarice has also involved him in extortion, armed robbery, fraud and bookmaking. His arrest record, beginning with a rape charge at the age of 19, extends back 35 years to his hometown of Cleveland, Ohio. To the California State Assembly Rackets Investigating Subcommittee, Fratianno was an "important cog in the organizational wheel" of the Mafia. To Joseph Alioto, Fratianno was worth recommending to the loan officer of his bank as a man whose "credit is considered good by all with whom he has done business." Fratianno's "business" experience was almost nonexistent, and Alioto had to have known of his criminality. Fratianno had been in prison from 1954 to 1960 on an extortion charge. He was released from parole only a few months before Alioto recommended him. As for his "credit," Fratianno was a disastrous risk. He defaulted on the loans, leaving Joseph Alioto, who vouched for him, and the bank in the embarrassing position of trying to collect a debt from one of the most disreputable mobsters in the nation. A sizable part of the debt is still unpaid.

The exact origin of the Alioto-Fratianno relationship is unknown, but some of the details of how that association developed and finally blossomed have been pieced together by state and Federal investigators, and LOOK.

Fratianno has the ability to figure a profitable angle to just about everything. "If Jimmy meets a man with a million dollars, he wants half," a former close associate told us. "If he runs into a truck driver with $20, he wants $5." And it was within the California trucking industry that Fratianno sought to enrich himself. He began driving toward that goal—literally—as soon as he was released from prison in 1960.

With funds provided by two Cosa Nostra pals, both of whom have been linked to Alioto, Fratianno soon set up a small trucking company in Sacramento. His partners were his wife Jewel, his son-in-law, Tommy Lee Thomas, and:

—Frank "The Bump" Bompensiero, 63, a portly, cigar-chewing mobster identified by the FBI as a Mafia leader in San Diego. He was at the time on parole from San Quentin for bribing a public official. A Federal Bureau of Narcotics report describes Bompensiero as "a Mafia killer held in great fear by the underworld." An acquaintance told us he has "a great sense of humor, but (is) capable of shooting you in

continued

the back of the head in a minute."

—Angelo "Cheese King" Marino, 45, believed to be a cousin of Bompensiero and co-owner with his father Salvatore of the San Jose-based California Cheese Co., wholesale suppliers of ricotta and mozzarella cheese to pizzerias and supermarkets. Once heavily involved in the rackets in Pittsburgh, Pa., and Youngstown, Ohio, the Marinos still serve as important representatives of the Mafia on the West Coast. Salvatore Marino has been the subject of a 1964 deportation attempt by immigration authorities and was identified as a top Mafia racketeer in testimony before the U.S. Senate McClellan Committee. His son Angelo was prosecuted for income tax evasion in 1967, but the case was dismissed after his attorney elicited an admission from the FBI that it had been conducting electronic surveillance of the Marinos. The lawyer in this case and in all of the Marinos' important legal affairs for years was Joseph Alioto. Among the many services he performed for the Marinos was assistance in obtaining a $247,000 Small Business Administration loan for the cheese company, which, Alioto told us, "saved them from bankruptcy." After Alioto dispatched a law partner to Washington, the money for the two Mafia members was authorized in just 14 days—"Inordinately fast," an SBA lawyer told us.

Bompensiero and Marino remained in the background while Fratianno built up his business. He specialized in hauling dirt on highway-construction jobs and squeezing extra profits out of his drivers by refusing to pay them union scale. By late 1963, the Fratianno Trucking Co. was a potentially lucrative operation, and Fratianno—through Bompensiero and Marino—devised a plan that, as Fratianno put it, "will make us all rich."

Trucking in California is a cutthroat business. For small companies, profit margins are generally slim. The cost of expanding into a major carrier, however, is fearsome. Just one tractor-trailer rig costs around $37,000. Big money is needed to win big contracts. From his headquarters in Sacramento, Fratianno looked to Joseph Alioto in the West and Frank LaPorte in the East for help.

In Chicago, LaPorte, 64, is a top-rank Cosa Nostra chieftain. A former member of the Al Capone gang, he controls a variety of rackets and legitimate enterprises in southern Cook County and Will County (Illinois), and Lake County (Indiana).

Frank Bompensiero is an old friend of LaPorte and, according to Federal authorities, contacted the Chicagoan and informed him of the potential in California trucking.

At the same time, in the West, Bompensiero was in communication with Angelo Marino, Joseph Alioto's client in San Jose. The content of some of their conversations, often in Italian, is locked away in Government files. However, it is known that they discussed Jimmy Fratianno and his quest for expansion capital.

Alioto was then organizing his First San Francisco Bank and seeking out future customers. He had also been thinking of entering politics for the first time. But despite encouragement from fellow Democrats to run for mayor in 1963, he rejected the opportunity because of "business obligations."

Those obligations apparently included a series of nighttime meetings at the Nut Tree, a restaurant along the highway between San Francisco and Sacramento. Among those present at one or more of the conferences, in addition to Alioto, were Fratianno, Bompensiero, Angelo Marino, LaPorte and one of Jimmy Hoffa's top Teamster representatives on the West Coast. Alioto's plan to organize a bank was a subject of intense discussion.

After one meeting, Fratianno said he was "excited" about the possibilities for the future because "my man [Alioto]" would control the bank's board of directors. Fratianno also expressed the belief that he would be able to buy a piece of the bank's stock. Later, after another meeting at the Nut Tree, Fratianno said Alioto was excluding him because of his hoodlum reputation but had assured him he would be able to obtain loans from the bank.

The First San Francisco Bank opened its doors for business in July, 1964. Fratianno, still hungry for capital, did not forget the promise. Negotiations in San Francisco were arranged.

On the morning of November 5, 1964, Fratianno and Angelo Marino met with Joseph Alioto at his 111 Sutter St. law offices to discuss Fratianno's finances. Alioto called the bank to set the loan wheels in motion. Later in the day, two intelligence agents saw the pair of mobsters visiting the Bay Area's senior Cosa Nostra boss, Jimmy Lanza, at his olive-oil company's office. Fratianno and Marino were either paying a courtesy call on the resident Mob boss or soliciting his advice or help. Lanza, who was in the vicinity of the convention of Mafia dons at Apalachin, N.Y., in 1957, has been friendly with members of the Alioto family for more than 30 years. In fact, Lanza's father, a San Francisco Cosa Nostra chieftain until his death in 1937, was in business with Alioto's father in a Fisherman's Wharf restaurant.

A police stakeout on Lanza, after the Apalachin trip, revealed numerous instances of Alioto-Lanza contact. One day in 1958, agents observed Joseph Alioto and his father meeting with Lanza at the latter's office. Joseph Alioto was the first to leave and was later interrogated by Federal agents. He stated he was planning to accompany Lanza to Los Angeles the next day to represent him before a grand jury investigating the Apalachin affair. Apparently unnerved by his encounter with Federal authorities, Alioto sent another lawyer from his office in his stead.

Two months after the 1964 meetings at the Alioto and Lanza offices, Fratianno received the first of five loans from the First San Francisco Bank.

On January 19, 1965, the bank made out a $28,000 cashier's check in favor of the Fratianno Trucking Co.; an additional $27,000 was placed in a checking account; and a $5,510 discount charge was levied against the loan. The signatures on the loan agreement were those of Fratianno's wife Jewell and their son-in-law, officers of the company. The cashier's check was given to a San Jose equipment firm, one of whose owners is a friend of Angelo Marino, as part payment on 16 dump trailers that Fratianno was buying from them. The trailers provided the collateral for this first loan.

Within two weeks of receiving this $55,000 loan, Fratianno stepped out of the role of under-financed trucker long enough to funnel $35,000 to a man who joined in a Mafia bid for a Las Vegas casino.

LATE IN JANUARY, Fratianno was hospitalized in Los Angeles, where he had a sack of "ping-pong balls" removed from his chest cavity. The balls had been installed years before after a lung removal. While he was in the hospital, Fratianno whiled away his recuperation by making repeated long-distance calls to Angelo Marino in San Jose. He was at the same time in the process of obtaining further loans from Alioto's San Francisco bank.

The bank quickly discovered the drawbacks of dealing with Mafiosi like Fratianno. On April 6, 1965, a state investigator assigned to surveillance of organized crime inquired about the transaction. He was put in touch with the bank's vice president, Joseph R. Demers, who, he noted, was obviously upset about being interviewed on this subject.

Asked whether Fratianno had approached the bank by himself or had been recommended, Demers

THE MAFIA MEN IN THE MAYOR'S LIFE

Jimmy Fratianno *A Mafia "executioner" credited with a role in at least 16 murders; currently regarded as most influential active mobster on Pacific Coast.*

Salvatore Marino *Ex-Pennsylvania Mafia racketeer now operating in San Jose, Calif.; with son Angelo, controls California Cheese Co.*

Angelo Marino *Believed to be cousin of Bompensiero and leading Mafioso in his own right; in contact with major hoods across the nation.*

said he was introduced by "Joseph Alioto, who is a client of the bank and a well-known attorney." Alioto had then gone on to make the incredible statement: "his credit is considered good by all with whom he has done business." Demers did not mention that Alioto was the chairman of the board of the bank.

Inquiries about the loan did not stop the bank from doing further business with Fratianno. Between May and October of that year, Alioto's bank extended four more loans. The money, $105,000 in all, helped recapitalize a Mafia-controlled-and-operated trucking company that cheated its drivers, cheated insurance companies, stole truck parts from rivals and, in a little over a year, would have a fatal collision with the combined legal powers of the U.S. Government and the State of California.

No one contacted by LOOK was willing to accept responsibility for the loans. The bank refused to discuss the situation. Alioto admitted to us that he met with Fratianno in his offices. But, he asserted, he sent Fratianno to the bank only because Teamster organizer Jack Goldberger "vouched" for the ex-convict. Goldberger, in turn, called Alioto's allegations "a lie." He, too, admitted meetings with Fratianno but adamantly denied any role in the loans. Fratianno himself denied everything except receipt of the loans. When we located him in Phoenix, he told us he had never met Alioto or Goldberger.

Back in Chicago, in 1965, Mafia don Frank LaPorte also regarded Fratianno as a good credit risk. At the same time that The Weasel was negotiating the Alioto-arranged loans in San Francisco, LaPorte was creating deals of Byzantine complexity designed to inject 225,000 anonymous dollars into the Fratianno Trucking Co.

Involved were two banks, the Mercantile National Bank of Chicago and the Exchange National Bank of Chicago, and several of LaPorte's relatives and business fronts.

Six days after Alioto's bank made its first loan to Fratianno in San Francisco, a front man for LaPorte borrowed $75,000 from the Exchange National Bank. The money was secured with stocks, and the bank did not question the reason for the loan. A month later, on February 19, 1965, another LaPorte front man, his brother-in-law, Jimmy Ross (né James la DeRosa), received $180,000 from the Mercantile National Bank. The loan, approved by the bank's president, Lewis E. Corrington, Jr., turned out to be grossly unsecured and was later defaulted.

The more than a quarter of a million dollars from both Chicago banks was brought to California by LaPorte and Ross. Somewhere along the line, $30,000 disappeared. Cashier's check #653908 from Mercantile for $150,000 and cashier's check #805546 from the Exchange Bank for $75,000 were turned over to Fratianno for the purchase of trucks and parts.

His newly enlarged truck fleet kept Fratianno busy, but he remained in touch with LaPorte, Bompensiero, the Marinos in San Jose and other friends in Chicago and points East. He was also in touch with Joseph Alioto. Alioto made "at least a dozen" long-distance calls to Fratianno Trucking. A former employee of the firm remembers the calls well and told us: "I was surprised later when I read he was elected mayor, because he seemed so friendly with Jimmy."

FRATIANNO WAS UNDER heavy surveillance, and by the fall of 1965, it was obvious that some new kind of operation was in the works. On October 18, Los Angeles Police Department agents watched LaPorte and Bompensiero check into the fashionable Beverly Wilshire Hotel. Trailing not far behind was The Weasel. As the three Cosa Nostra bosses settled into cushioned comfort in the Brown Derby restaurant across the street, two LAPD undercovermen took the adjoining booth and heard snatches of conversation about the forthcoming business deal.

The following month, Fratianno flew to San Diego where he stayed at Bompensiero's house. On November 15, agents saw the two talking in a car registered to local Mafioso Joe Matranga. One of the subjects under discussion during Fratianno's visit was a plan to sell lard in Mexico in an attempt, with Bompensiero's help, to monopolize the market there. The U.S. officials, who knew what was said, pondered where the two mobsters would get large quantities of lard, of all things. The answer came three weeks later.

On December 6, 1965, Frank Bompensiero boarded Western Airlines Flight #791 in San Diego and flew to Mexico City. There, he checked into the plush El Presidente Hotel. Registered in the same hotel and on hand to meet Bompensiero was Rudolph Papale, president of the Regal Meat Packing Co., of San Leandro, a community across the bay from San Francisco. Bompensiero, we have learned, was there to "fix" things with the government and wasted no time. The two men immediately contacted a Mexican businessman with wide political influence.

According to a U.S. narcotics agent, Bompensiero has myriad connections in Mexico and tried to use them to get Papale a license to ship lard into the country. The two men's activities in Mexico City were of considerable interest to a number of U.S. agencies. Two questions perplexing them were: Who was Rudolph Papale, and was the lard deal his only connection with the San Diego Mafia boss?

Rudy Papale is the brother-in-law of Mayor Joseph Alioto. Alioto personally installed Papale as president of the Regal Meat Packing Co., which is partially owned by Alioto. "This kid is the salt of the earth. Let me tell you, they don't come any better," the Mayor told us. The families of both men are so close that their wives run the jointly owned A. Genaro antique shop on Union Street in San Francisco.

The Mayor's brother-in-law admitted to us that Regal used the services of Frank Bompensiero, the San Diego Mafia leader, after an introduction by Alioto's client, Angelo Marino. He said Regal "picked up" all of Bompensiero's Mexican expenses because he was "doing a favor for us."

Papale and Bompensiero apparently left Mexico separately. Chewing on an expensive cigar, Frank Bompensiero tried to pass through customs in San Diego. Alerted U.S. Customs agents gave him a thorough shakedown. No contraband was found, but three phone numbers in Bompensiero's wallet were. Two were listed to Frank LaPorte in Chicago and one to the Alioto-connected Regal Meat Packing Co., of San Leandro, Calif.

The story behind the Regal Packing Co. leads to still other direct links between Joseph Alioto and the underworld.

Back in the 1940's, long before Regal was founded, three men—Emilio Giorgetti (his spelling), and Louis and Charles Figone—owned Regal's forerunner, the Holly Meat Packing Co., of Oakland. "Gam" Giorgetti earned the money he invested in the $6-million-a-year meat enterprise as proprietor of a number of conspicuous illegal gambling clubs just south of San Francisco. His notoriety won him the title of "Gambling Czar" of San Mateo County.

Illiterate, tough and a millionaire, Giorgetti belonged to the old-fashioned Mafia school known as "Mustache Petes." The key to his success was his 20-year friendship with the local sheriff, James McGrath, who provided protection from police raids. The cost was high, but since Giorgetti often evaded his income taxes, he could afford it.

As early as 1947, Joseph Alioto was the attorney for Holly Packing. He also handled most of Giorgetti's personal legal problems and engaged in mutually

continued

Frank Bompensiero *San Diego Mafia leader with reputation as ruthless killer; an ex-convict, he was imprisoned most recently for bribery of public officials.*

Emilio Giorgetti *Deceased millionaire Mafia gambler, hoodlum and political corrupter in San Francisco area in 1940's. Died, natural causes, 1960.*

Frank LaPorte *A top Chicago Mafia boss; controls numerous rackets in Illinois and Indiana; has business interests in California.*

Jimmy Lanza *Aging but influential resident boss of the San Francisco Cosa Nostra; was at a hotel in the vicinity of the 1957 Apalachin meeting of Mafia bosses.*

profitable business with the controversial gangster.

Trouble enveloped Giorgetti in the late 1940's with devastating effect. First, public disapproval of San Mateo County vice conditions forced Sheriff McGrath out of office. Then, state and Federal investigators, heeding the demand for reform, began probing Gam's career.

A brief scandal erupted in 1950 when a recently resigned Treasury agent informed the Kefauver Senate Rackets Investigating Committee that Giorgetti's accountant had told him the gambler's records contained references to massive payoffs of public officials. Through legal maneuvers, Giorgetti's tax lawyer, Joseph Alioto, managed to delay for several months opening the books to investigators. By the time they were opened, no references to payoffs were found and the accountant had died of natural causes. Alioto was president of the San Francisco Board of Education at the time. One local newspaper, the *News*, demanded his resignation because of his "conduct in representing a notorious gambler." Alioto came in for more criticism, this time from some of the senators of the Kefauver Committee, when he advised Giorgetti that it would not be necessary for him to respond to a Committee subpoena to testify in San Francisco. Thereupon, Kefauver ordered Giorgetti to appear before a hearing in Washington.

SOME OF THE HEAT roasting Gam was by then getting to Alioto. He announced that he would not accompany his client to Washington and said he had advised him to tell the truth. He denied the contention that the financial records contained payoff data and added an astonishing statement: "I would withdraw from the case if I thought Giorgetti was a racketeer, mixed up with gangs. I am satisfied he is not."

At that point, San Mateo "Gambling Czar" Giorgetti sought refuge in the more tolerant atmosphere of Las Vegas. There, no one spoke disparagingly of him or such friends as gangsters Sam Termini and Benny Binion. Binion, then Giorgetti's partner in a Las Vegas casino, was not only a "racketeer" but a convicted murderer. Once asked about Binion's modus operandi, a retired police captain replied, "His MO was always the same. Kill 'em dead and they won't give you no more trouble." Such were the people Giorgetti was "mixed up with."

In 1953, Giorgetti, suffering from a throat disease, was indicted for income tax evasion. Alioto returned to Gam's side and succeeded in keeping him out of jail. Giorgetti was convicted, placed on probation and fined $20,000 after Alioto impressed the judge with impassioned pleas that his client would die if imprisoned. Giorgetti paid his fine and had enough left over to invest $100,000 in a hidden interest in a Lake Tahoe casino. According to a Federal report, he stole nearly $500,000 of the casino's profits during the 1955 season.

That year was crucial for Alioto. He had gone into partnership with Giorgetti's Holly Packing partners, Louis and Charles Figone, and two men in a potentially lucrative land-speculation deal. Their company, the Castlewood Corp., needed capital. On January 10, 1955, they turned to Giorgetti. He lent them $55,000 for six months. Alioto and the others signed the promissory note.

To this day, Mayor Alioto says he sees no impropriety in his many dealings with the powerful Mafia gangster. "From the time I knew Giorgetti to the time of his death [1960], he was engaged in no illegal activities whatever"—a statement that ignores the facts.

In 1955, Holly was sold for more than $1 million. With his share of the proceeds, Giorgetti's partner, Louis Figone, founded Regal Packing and picked up where Holly left off. Alioto was the company attorney, and in 1957 became a stockholder. In 1960, he was a member of the board of directors. And, that same year, he hired his brother-in-law Rudy.

It was shortly after Papale's elevation to the corporate presidency in 1965 that Regal's lard deal with Frank Bompensiero developed and, eventually, went awry. Jimmy Fratianno told Cosa Nostra pals: "The deal fell through." Papale insisted to us that Fratianno was not a partner in the venture but admitted reluctantly that he, Papale, too had met several times with the Mafioso. Once again, the peripatetic Angelo Marino had made the original introduction, this time in San Francisco.

The Mayor's brother-in-law also revealed to us that the Alioto-connected meat company has over the years marketed many of its products in conjunction with the Marinos' cheese firm. After some prodding, Papale said he had "heard" of the Marino connections with organized crime but nevertheless continues to "socialize" with Angelo Marino.

IN FEBRUARY, 1966, the Mob, in the form of the Fratianno Trucking Co., arrived in El Centro, Calif., to begin work on a $15 million interstate-highway section. The hot, dusty town had never seen anything like it before. Slick city boys with nicknames like "Weasel," "The Lips" and "Nick The Greek" descended on the Imperial Valley community with a roar, dressed in greasy coveralls and leading, thanks in part to Joseph Alioto's financing arrangements, a great vanguard of diesel trucks.

The El Centro project looked financially ripe, and Fratianno extended invitations to a few close friends to get in on the action. One of those who responded was a reputed killer, Leo "The Lips" Moceri, of the Ohio Mafia. Carrying $10,000 in cash with him, Moceri flew to El Centro from Cleveland and moved into an apartment with Fratianno. The money was for "investments" and was immediately loan-sharked to truck drivers at five percent interest per week, or a true rate of over 500 percent interest per annum. Over the years, Moceri the loan shark has been involved in at least 17 murders in Ohio, Michigan, Illinois and Florida. A Federal fugitive for 17 years, Moceri was caught in Hollywood in 1952, "slugging" a pay telephone for a $1.20 toll call. He had $1,300 in cash on him and a new Cadillac parked at the curb. The car was registered to the Marino family's California Cheese Co. branch in Los Angeles, which Moceri was using as a mail drop. Extradited to Ohio, he ended up with a five-year jail term.

Sharing the El Centro apartment with Moceri and Fratianno was Frank Bompensiero, who hated the heat, the flies and, most of all, the trucks. He was LaPorte's man at the construction site, insurance that Fratianno would refrain from cheating.

Bompensiero and Fratianno were joined regularly in El Centro by other veterans of the restaurant meetings involving the Alioto bank. Frank LaPorte and Angelo Marino were in and out of town.

Here was a remarkable gathering of Joseph Alioto's underworld contacts. Present in El Centro was Fratianno, the mobster for whom Alioto had helped to obtain loans; present were LaPorte and Bompensiero, the mobsters who participated in the Nut Tree conferences; present was Angelo Marino, the mobster to whom Alioto had given advice and counsel. Furthermore, during this period, telephone calls were made from Fratianno's apartment in El Centro to Regal Packing, whose president, Alioto's brother-in-law, consorted with Mafiosi.

Incurable greed brought Fratianno down in El Centro. He could not resist the chance to cheat his truck drivers. Because of his Teamsters Union connections, Fratianno seldom paid the legal minimum wage. When a man complained to the Union that he was receiving only $2.50 per hour, less than half of what it should have been, he would be told, "You're working ain't you?" Fratianno's favorite trick in El Centro was to "sell" a truck to the drivers, thereby making them "owner-operators" and subject to considerably fewer protective safeguards.

The house came tumbling down when a Fratianno henchman and drug addict, Nick "The Greek" Diacogianis, slugged a complaining driver. The man went to the Imperial County district attorney's office and filed assault charges. State and Federal investigators stepped in for a closer look, and found numerous violations of law. Fratianno was arrested. His earth-hauling contract abruptly ended, he defaulted on his truck loans. Strangely, unlike most of Fratianno's other creditors, Alioto's bank never sued for damages or recovery of the debt.

Fratianno was convicted of conspiring to violate Federal minimum-wage laws and filing false statements with the Government. The judge surprised everyone by placing The Weasel on probation for three years and levying a $10,000 fine. Fratianno could have received five years in prison.

Besides having to find the money to pay his fine, Fratianno still worried about his bank debt in San Francisco. At the El Centro airport one day in November, 1968, he told a bail bondsman and a state deputy attorney general his problems. "I still owe money to my friend Joe in San Francisco, and I want to pay him back," Fratianno said. When asked who "Joe" was, he replied, "Joe Alioto. You know, the Mayor." The deputy attorney general reported the incident to the FBI and later told LOOK investigators he had "become jaded about political corruption because of my job" and was not surprised that a big-city mayor "would know a bum like that."

Fratianno was not unhappy with his Federal sentence, but his luck ran out when he hit state court. He received a one-to-three-year prison sentence and a fine of $3,000.

As Fratianno plunged to his downfall, Joseph Alioto moved suddenly into the ascendant. When San Francisco's Democratic mayor, John Shelley, announced he would not run for reelection in 1967, party moneymen tapped Joseph Alioto as his replacement. Alioto responded eagerly and won handily. Contributions fueling his expensive campaign came from many sources, including Teamster friends of Fratianno. The Cosa Nostra did its part. Alioto's old associates, the Marinos, dropped "substantial" amounts into the election coffers. Salvatore Marino ("a very fine person," the Mayor told us), whose place on the U.S. Attorney General's list of major racketeers was well known to Alioto, even bought six $100 seats to the Inaugural Dinner.

Both the brother and wife of Bay Area Mafia boss Jimmy Lanza, whose rank as a major Mafia leader was equally well known to Alioto, told a LOOK investigator that Jimmy Lanza, too, had attended the same dinner. Later, Mrs. Lanza changed her mind. She had been mistaken, she said. Her husband stayed home that night.

Now that Alioto is the leading candidate for California's Democratic gubernatorial nomination, a professional political manager and a committee are hard at work raising the wherewithal for the campaign next year. Seen in the files of potential purchasers of tickets to a $100-a-plate fund-raising dinner on September 20 were the names of Salvatore Marino and the California Cheese Co.

Alioto's law firm, in which he still retains an interest, continues to represent the Marinos and the California Cheese Co. His brother-in-law, Papale, remains in frequent friendly contact with Angelo Marino. The latter talks regularly with Bompensiero, who still sees LaPorte. And so on. Mayor Joseph Alioto's channels of communication with the Cosa Nostra remain open. END

THE WEB OF RELATIONSHIPS

Salvatore and Angelo Marino *Legal clients of Alioto. Angelo met at Nut Tree Restaurant. Political contributions to Alioto. CCC does business with RPC. Angelo invested in Fratianno Trucking. Angelo-Papale telephone calls.*

Jimmy Fratianno *Met at Nut Tree Restaurant. Secured Alioto-arranged loans. Met with Lanza. Met several times with Papale.*

Frank Bompensiero *Met at Nut Tree Restaurant. Believed relative of Marinos. Invested in Fratianno Trucking Co. Observed Fratianno Trucking Co. operation for LaPorte. In Mexico City with Papale.*

Rudolph Papale *Alioto in-law. Brought into RPC by Alioto.*

Mayor Joseph L. Alioto

Jimmy Lanza *Former client of Alioto law firm. Political supporter of Alioto.*

Emilio Giorgetti *Client of Joseph Alioto. Lent money to Alioto-connected Castlewood Corporation, 1955.*

Frank LaPorte *Met at Nut Tree Restaurant. Arranged financing for Fratianno Trucking Co.*

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No. 80-628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COWLES COMMUNICATIONS, INC.,

Petitioner,

vs.

JOSEPH L. ALIOTO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

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Petitioner hereby respectfully moves that the Court defer consideration of the Petition for Writ of Certiorari for a period of fifty days, or for such other period that the Court may deem appropriate, because of the following circumstances:

1. On January 5, 1981, petitioner's counsel obtained a copy of a newly published biographical book entitled "THE LAST MAFIOSO—The Treacherous World of Jimmy Fratianno" by Ovid Demaris (Times Books, 1981) ("the

Fratianno book"). Two copies of the Fratianno book have been lodged with the Clerk of the Court and a copy has been furnished to respondent.

2. The Fratianno book is the life history of Jimmy Fratianno as told to Ovid Demaris; Fratianno is a self-acknowledged former member of the Mafia or "La Cosa Nostra" and is the same Jimmy Fratianno named in the LOOK article that is the subject of respondent Joseph L. Alioto's complaint for alleged libel in this cause. Fratianno now is in the Witness Protection Program of the Justice Department and has testified on behalf of the Government in obtaining the convictions of 18 organized crime defendants in five separate trials.*

3. Part IV of the Fratianno book (pp. 137-160) is entitled "MY FRIEND, JOE." It discloses, for the first time to petitioner's knowledge, Fratianno's account of his meetings, dealings and friendship with respondent Alioto. Fratianno's account is in direct conflict with

---

* In addition to the Government's vouching for Fratianno's credibility in the criminal trials in which he has testified thus far, Ovid Demaris states in his "Author's Note" at the beginning of the Fratianno book (viii):

> I warned him [Fratianno] at the outset that if I caught him in a single lie, I would walk out and burn the tapes. His response was, "Ovid, forget about it. My life's in your hands." The way Jimmy saw it, his only chance of escaping the vengeance of the Mafia bosses who wanted him dead in the worst way was for the book to earn enough money for him to leave the country, taking with him his wife, step-daughter, and divorced mother-in-law. He understood that one lie could lead to the book being discredited and that was the last thing he wanted in this world.
>
> The government had also issued its warning. One lie and all plea bargains were off, which meant that he would spend the remainder of his life behind bars, or could even face the death penalty for two murders in Cleveland and one in San Diego.

respondent Alioto's testimony in the trial court in several critical respects:

> *According to Fratianno*, he was first introduced to Alioto by Angelo Marino, a "caporegime" in the San Jose "family" of the Mafia and a close friend of Alioto. (Fratianno book 138-139.) Thereafter, Fratianno made a regular practice of "dropping by" Alioto's office without appointments to talk with Alioto whenever his business took him to San Francisco. (*Id.* 141-142.) On one visit Fratianno brought Jack Goldberger of the Teamsters Union to Alioto's office and introduced him to Alioto, at Alioto's request, in order to persuade Goldberger to cause Teamsters' pension money to be deposited in Alioto's First San Francisco Bank. (*Id.* 142-143.) Fratianno also brought Frank Bompensiero, a San Diego Mafia gangster, to Alioto's office and introduced him; Fratianno was "pleased at how quickly the two men warmed up to each other." (*Id.* 143.) Alioto later offered to provide financing of $2.3 million to enable Fratianno and Frank LaPorte, a Chicago Mafia leader, to acquire controlling interest in the Crystal Bay Casino in Lake Tahoe, Nevada. (*Id.* 148, 150-151.)
>
> *According to Alioto*, he met Fratianno *only once*, when Jack Goldberger brought Fratianno to Alioto's office and introduced him. Alioto also testified that he had never heard of Frank Bompensiero or Frank LaPorte.

4. Pursuant to Rule 27(b), F.R. Civ. P., petitioner has filed a motion in the District Court in this cause for leave to take the deposition of Jimmy Fratianno, based on the passages from the Fratianno book that are in conflict with Alioto's trial testimony. In the event the motion is allowed, petitioner estimates that a period of at least thirty days will be required to serve a subpoena upon and take the deposition of Fratianno. The deposition when transcribed and filed will be the predicate for

a motion either in this Court or the District Court, seeking whatever further proceedings appear necessary to do justice and protect the petitioner's rights in this action.

5. In the event the Court has decided to grant the Petition for Writ of Certiorari, petitioner requests that this motion be treated as withdrawn.

Respectfully submitted,

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DATED: January 7, 1981.

No. 80-628

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

COWLES COMMUNICATIONS, INC.,
Petitioner,

VS.

JOSEPH L. ALIOTO,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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JOSEPH L. ALIOTO,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

I

STATEMENT OF THE CASE

A. The Parties

Plaintiff and respondent in this action is Joseph L. Alioto. Respondent was born in San Francisco, California, in 1916. He enjoyed a brilliant academic career, and graduated from law school at the Catholic University of America in Washington, D.C. in 1940. He returned to San Francisco, and was admitted to the California bar. During the war years he worked in the Antitrust Division and for an agency called the Bureau of Economic Warfare. He entered

private practice in 1945 and in 1967 was the sole proprietor of a law firm employing 35 persons, including 17 lawyers. He was among the pioneers in the area of modern plaintiff's treble damage litigation and argued two important cases in that area in this Court, *Continental Ore v. Union Carbide,* 370 U.S. 690 (1962) and *Continental Baking Co. v. Utah Pie Co.,* 386 U.S. 685 (1967).

Respondent had always been active in local politics and accepted successive appointments to the San Francisco Board of Education and Board of Redevelopment. In 1967, respondent was co-campaign chairman of the committee to elect Eugene McAteer as Mayor of San Francisco. Several months before the election McAteer died of a heart attack while playing handball. Benjamin Swig and other prominent San Francisco Democrats persuaded respondent to run in McAteer's place, and respondent was elected Mayor of San Francisco in November of 1967. He was considering running for governor at the time the article in question appeared in September, 1969. (First trial, pp. 1702-15; second trial, pp. 227-52. Although respondent does not believe that transmission of the voluminous record is essential to an understanding of the case, Rule 19.1, and accordingly has not requested transmission of the record, record references are respectfully included herein.)

Look Magazine was only one property of petitioner Cowles Communications, Inc., an Iowa corporation owned by Gardner Cowles, formerly a defendant in this case. *Look* was already in bad financial condition in 1969, and it ceased publication in 1971 (C.T., first appeal, 1668). Apparently it was revived shortly in 1980.

B. Course Of Prior Proceedings

This diversity libel action was filed on September 5, 1969, in the Northern District of California. Petitioner's motion for summary judgment on the *Sullivan* malice issue was denied by the presiding judge, Honorable Bruce R. Thompson, on March 11, 1970 (C.T. first appeal 614-17). A 15-day jury trial ensued in April and May of 1970. The case was submitted to the jury on general verdict forms and the jury was unable to agree and a mistrial was declared. After the mistrial Judge Thompson denied petitioner's motion for judgment, which challenged the sufficiency of respondent's evidence of malice (C.T. 1388-89).

Judge Russell E. Smith was assigned to the case and petitioner renewed its motion for summary judgment on the malice issue. Judge Smith denied the motion on July 28, 1971 (C.T. 1503). The second trial began in San Francisco on September 25, 1972, and concluded by verdict on October 27, 1972. The jury at the second trial found that that article was false in one or more particulars (C.T. 1956-7). Judge Smith instructed, as Judge Thompson had at the first trial, that the competent evidence on the subject would support only a finding that the alleged Nut Tree meetings were false (See Appendix hereto, pp. A-3 and A-4). The evidence in that regard included not only the denials of respondent, but the denials of disinterested witnesses, including Jack Goldberger (Second trial, pp. 1162-3), and all of the employees of the Nut Tree Restaurant (C.T. 130-199), and a lack of corroboration from at least two law enforcement agencies, being the FBI and its California counterpart, the CII (Petition, pp. 25a-26a).

The jury also found that the article was defamatory (C.T. 1956-7). In instructing the jury on defamation, Judge Smith asked the jury to determine whether the untruths which it found in the article tended to defame respondent, and instructed them that in order to make such a determination the jury should consider the untruths or falsity in relationship to the article as a whole. The jury was instructed that statements in the article might be false without at the same time being defamatory. The Court instructed that defamatory statements are such as expose the plaintiff to disgrace or bad repute, and that if the untruths did not defame plaintiff, there should be no finding of defamation. Judge Smith's defamation instruction is included in the appendix hereto at p. A-2.

The jury at the second trial was unable to agree on the malice issue, and a second mistrial was declared. Defendant moved for judgment N.O.V. on the malice issue, and this was granted, Judge Smith concluding that he would not find malice, although conceding that another judge or a jury reasonably might do so (C.T. 2031-38). Respondent appealed to the Ninth Circuit. Petitioner did not cross-appeal or raise any point in its brief or at argument concerning the propriety or lack of it of the findings of falsity and defamation by the second jury (Petition, 3a). The Ninth Circuit remanded for trial of malice and, if malice was found, damages (Petition, 15a). This Court denied certiorari. 423 U.S. 930 (1975).

The third and fourth trials were as wide open as the first and second had been. Petitioner was completely unfettered in its proof, and called a number of witnesses who

were strictly truth-or-falsity witnesses, not malice witnesses (Fourth trial, proceedings of Mar. 29 & 30, 1977—testimony of Demers, Greenleaf, and Yore). At the third and fourth trial, the parties proceeded upon the assumption that the Nut Tree allegations were false and defamatory (Petition, 3a).

Judge Smith also presided at the third trial. The jury at the third trial hung on the malice issue 5-1 in favor of respondent. By stipulation, the fourth trial was to the Court, Honorable William W. Schwarzer (C.T. second appeal, 298). Judge Schwarzer found malice and compensatory damages, but awarded no punitive damages. Petitioner appealed to the Ninth Circuit and for the first time on appeal raised an objection to the finding of falsity by the second jury. No objection to the finding of defamation by the jury at the second trial was raised by defendant on the second appeal (Petition, 2a). On July 21, 1980, the Ninth Circuit affirmed Judge Schwarzer's judgment, and the instant petition was filed shortly thereafter.

II

SUMMARY OF ARGUMENT

A. In an affidavit filed before the first trial, petitioner for tactical reasons made what in respondent's view constitutes an admission not only of substantial falsity but of malice (C.T. 785, reproduced below at pp. 9-10). In any event, the admission, which is that petitioner never believed respondent was a member of the Mafia, committed any illegal acts, or knowingly furthered the criminal purposes of the Mafia, is an important backdrop to the other evidence in the case.

B. By the admission of the editor and authors, and as appears from a reading of the article, the Fratianno bank loans from First San Francisco Bank are the heart of the article (see below, pp. 10-11). According to the true facts as found at the fourth trial (Petition 26a), respondent had no knowledge of Fratianno's criminal record or Mafia connections at the time of the loans, respondent having met Fratianno only once and very briefly, and respondent never having heard of Fratianno prior to that single meeting (See also Appendix hereto, pp. A-6 to A-12). The First San Francisco Bank loans to Fratianno were made not by respondent but by officers of First San Francisco Bank on the business merits of Fratianno's loan application (C.T. second appeal 270, being designation of testimony of Nicholas Rizzo). Prior to and after the First San Francisco Bank loans, Fratianno obtained other legitimate loans in greater amounts from Bank of America and Bank of California (e.g., First trial, testimony of Martin, Campion, Munsill, Graham & Steinmetz, being persons associated with banks from which Fratianno obtained loans.) The article makes no mention of Fratianno's loans from Bank of America or Bank of California. The Nut Tree meetings and related allegations of the article cause the Fratianno loans from First San Francisco Bank to appear to be unjustified on the merits and the result of a willful Mafia conspiracy between respondent and Fratianno. Thus, the finding of falsity and malice on the Nut Tree meetings is a finding of substantial falsity and malice.

C. There Was No Procedural Unfairness in the Case.

1. The Nut Tree meetings were denied not only by respondent, but by Angelo Marino and Jack Goldberger, alleged participants in the meetings (Appendix p. A-3),

Goldberger being a completely disinterested witness (Petition, 30a). The FBI and California agencies had no evidence of the meetings, although they kept surveillance on some of the alleged participants (Petition, 25a-26a). All of the employees of the Nut Tree Restaurant, 70 in number, gave statements that they had no evidence of the meetings (C.T. 130-199). Petitioner offered no evidence of the truth of the meetings. Petitioner did not request an instruction that uncontradicted evidence may be disbelieved (First trial, May 12, 1970, pp. 14-29, 66, second trial, October 25, 1972, pp. 3552-55), but proceeded upon the assumption that the Nut Tree allegations were false. In these circumstances, Judge Thompson at the first trial and Judge Smith at the second trial properly instructed the jury that the competent evidence in the record would support only a finding that the statements in the article relating to the Nut Tree meetings were false.

2. In the second trial, the jury found not only falsity but defamation. Judge Smith instructed the jury that if it found the article contained false statements still the jury should not find defamation unless the false statements "taken in conjunction with the whole of the article" were defamatory of respondent (See Appendix hereto, p. A-2). Under California law a false statement in an article is actionable if the false statement "changes the complexion of the affair so as to affect the reader of the article differently than the actual truth would." *Hearne v. De Young,* 119 Cal. 670, 674 (1898); *Gantry Construction Co. v. American Pipe,* 49 C.A.3d 186, 196 (1975). The difference between the truth and the published statement must be of a

substantial character, and the published statement must produce a different effect upon the reader than would the truth of the matter.

3. Although on remand from the first appeal the trial court was to try only the issue of malice, petitioner was never precluded from making whatever proof it chose to make on any subject. The record at the fourth trial would independently have justified a finding by Judge Schwarzer that the Nut Tree and related allegations were false and defamatory (e.g., Fourth trial, 573-575 (Goldberger), 839 (respondent)). Such a finding is implicit in Judge Schwarzer's finding that the Nut Tree and related allegations were published in reckless disregard of the truth. If Judge Schwarzer believed the Nut Tree allegations were true, he would not have found malice. In finding malice and damages, Judge Schwarzer necessarily passed upon the falsity of the Nut Tree allegations and their substantiality.

4. Petitioner did not raise any objection to the instructions or findings of the second trial until after petitioner lost the malice issue at the fourth trial (Petition, 3a). If petitioner objected to the finding of falsity and defamation at the second trial, the objection should have been raised on respondent's appeal from the judgment N.O.V. in favor of petitioner after the second trial.

D. Both Judge Thompson and Judge Smith considered and denied petitioner's malice-based motions for summary judgment (C.T. 614-7; 1388-9; 1503). Although none of the juries was unanimous, the third being 5-1 in favor of respondent on malice, it is significant that none of the juries was willing to exonerate petitioner of the charge of reckless disregard or deliberate falsehood. On the first appeal the Ninth Circuit made an independent review of the evidence of malice and found the evidence to be sufficient for submission to a jury (Petition, 15a). This Court denied certiorari after the first appeal, *Alioto v. Cowles Communications, Inc.*, 423 U.S. 930 (1975). Judge Schwarzer's finding of subjective awareness of probable falsity is fully supported by the evidence and is well within the Constitutional framework of this Court's First Amendment decisions. The opinions of the Ninth Circuit in this case do not conflict with any of the four appellate opinions cited at page 20 of this petition.

III
ARGUMENT

A. Petitioner Admitted The Substantial Falsity Of The Article Prior To The First Trial

This action was filed on September 5, 1969. Early in the discovery, *Look* filed a lengthy affidavit of Martin Goldman, a *Look* editor who was in charge of the Alioto-Mafia article. The affidavit stated in part (C.T. 785):

> "E. *The Intended Meaning of the Article.*
>
> "At no time prior to publication of the article concerning Joseph L. Alioto by LOOK Magazine, did I believe nor did the authors indicate to me that they

believed, Mr. Alioto's relationship with the Mafia involved any illegal act on his part or that he was a Mafia member. LOOK Magazine did not publish, or intend to publish any such charge, as Mr. Arthur declared in his response to the September 9, 1969, television attack by Mr. Alioto on the authors, the article and LOOK. At no time prior to publication of the article, did I believe, nor did the authors indicate to me that they believed that Mr. Alioto had knowingly furthered any criminal purposes."

At the fourth trial of the action, Judge Schwarzer found that Goldman and *Look's* state of mind at the time of publication was that respondent Alioto "had never been implicated in any criminal activity or misused his office or position to shield or promote crime . . ." Petition, 30a.

Both the Goldman affidavit and Judge Schwarzer's finding at page 30a are inconsistent with the theme of the 5100 word article as that theme is expressed at page 3 of the Petition. Nowhere in the article is the substance of the Goldman affidavit conveyed to the reader. It is against the background of the Goldman affidavit that the other evidence in this case must be viewed.

B. The Difference Between The Nut Tree Allegations And The Facts As They Happened Is A Very Substantial Difference Which Is Central To The Theme Of The Article

Throughout all four trials of this case, *Look* admitted that the loans which Jimmy Fratianno obtained from the First San Francisco Bank were "the heart of the article". For example, Goldman testified in the second trial:

"I would say that the loans are the heart of the story. There is no doubt about that in my mind." (p. 1945).

At the fourth trial, he testified:

"Q. How do the bank loans figure in the theme of the article?

"A. They're the backbone of the article, the whole structure of the article is based on the bank loans and they relate to the overall theme in terms of the questions they raised about a web of alliances between a major public official and leaders of La Cosa Nostra." (p. 1077).

At the fourth trial, the District Court so found: "The heart of the article—and the subject which provided the impetus for the author's investigation—was a series of loans made by the First San Francisco Bank in 1965 to one James Fratianno." Petition, p. 21a.

Prior to publication in an interview with the authors, and throughout the four trials, Alioto maintained that he met Fratianno only once. That meeting was sometime in 1965, when Jack Goldberger, an acquaintance of Alioto's from San Francisco Democratic campaigns, brought Fratianno to Alioto's office and introduced him. Alioto had never heard of Fratianno before that day, and did not know that Fratianno had a long prison record or anything else about him. Goldberger, an officer of the Teamsters local in San Francisco, informed Alioto in Fratianno's presence that Fratianno had started a trucking company near Sacramento and would like some work from the California Rice Growers Association, an agricultural cooperative of which Alioto was president. Alioto stated that the RGA work was all contracted out. Goldberger then asked

whether Alioto might assist Fratianno in obtaining equipment loans from the First San Francisco Bank, a one-unit bank of which Alioto was chairman of the board. Alioto stated he would be pleased to do so. Goldberger and Fratianno departed. Alioto, who attended meetings of the bank's board but did not otherwise participate in its business, called the president of the bank, Nicholas Rizzo, and advised that James Fratianno would be applying for a loan. Alioto told Rizzo he did not know Fratianno "from Tom Mix" and that the loan should be made on the merits. Alioto had no further connection with the matter. Before and since that time he had directed other potential borrowers to the bank. (See Appendix D attached hereto, Appendix, pp. 5a-12a, being an excerpt from the prepublication interview between respondent and the authors.)

Fratianno had contemporaneously obtained from the Bank of America, Bank of California, and other banks, loans exceeding the amounts he sought to borrow from First San Francisco Bank, all without any involvement of Alioto, and all perfectly legitimate (e.g. Fourth trial, Plaintiff's Ex. 1, p. 1). The fact of the Fratianno loans from other banks is omitted from the article to bolster the impression that the First San Francisco Bank loans were a Mafia deal. Fratianno had won a lucrative highway construction job with the state, he showed the First San Francisco Bank a substantial net worth statement, and the loan was to be secured by trucks, and in fact most of the loan ($105,000) was paid directly to the equipment sellers (Testimony of Nicholas Rizzo, designated at C.T., second appeal, 270). For these reasons, Rizzo granted Fratianno's loan application (Testimony of Nicholas Rizzo, C.T. second

appeal, 270). A year or so later when Fratianno defaulted, the bank sold some of the equipment and took other responsible collection measures and reduced the default from $90,000 to $30,000. (Testimony of C. J. Moreno, Second trial, 813 et seq.; Petition, 29a).

At the fourth trial, on the issues of damages and malice, Judge Schwarzer found the foregoing facts to be true. Petition, pp. 26a, 29a.

The Nut Tree allegations present a second version of the Fratianno bank loans. According to this version, Alioto attended a series of nighttime meetings with Fratianno and a number of other hoodlums (LaPorte, Bompensiero, Angelo Marino), all of whom he knew to be associated with the Mafia or organized crime (Petition, Appendix D). With excitement, Alioto told them of his interest in the bank, assured them they would have access to the bank's money for whatever purposes they wanted, and promised Fratianno that Fratianno would be able to obtain loans from the bank, but told him that because of his hoodlum reputation, Alioto would be unable to obtain bank stock for Fratianno. Alioto and his Mafia friends also discussed how they would control the bank, according to the *Look* article. Also, according to the article, when Fratianno defaulted on the loans, the First San Francisco Bank did nothing to collect.

It is submitted that under the true facts as they happened, no Alioto-Mafia tie is to be inferred from the Fratianno bank loans. On the other hand, that tie would be fully substantiated if the Nut Tree allegations were true. This difference meets the substantiality test of libel in California under *Hearne v. De Young* and the other Cali-

fornia libel cases cited below at page 17. To use the words of *Hearne,* does the inaccuracy change the complexion of the affair so as to affect the reader of the article differently than the actual truth would? Is the difference [between the truth and the untrue statement] of a substantial character, and does it produce a different effect? Manifestly, the answer to both questions is yes. This is the applicable rule; the rule is not whether more than half of the 5100 words or 71 paragraphs are false.

There was therefore an ample basis upon which the jury in the second trial, Judge Schwarzer in the fourth trial, and the Ninth Circuit in the second appeal each found upon an independent review of the record that the gist or sting of the article lay in the Nut Tree allegations. *Look's* contention that it has never had a trial of the substantial truth of the article as a whole is incorrect. That issue was tried by the second jury when it found defamation as to the Nut Tree allegations, by Judge Schwarzer, and by the Ninth Circuit on the second appeal.

If the Nut Tree allegations are removed, there is no defamatory link between respondent and Fratianno, and no link at all between respondent and Bompensiero or respondent and La Porte, who were connected to respondent only by attendance at the Nut Tree meetings. That leaves only Emilio Giorgetti, the Marinos, and James Lanza. Respondent did corporate and tax work for Giorgetti until he died in 1960 (Fourth trial, pl's exhibit 5, pp. 34-44). In the 1960's, respondent's law office did some work for the Marinos (Exhibit 5, pp. 13-18). Giorgetti and the Marinos were not acquainted with each other. Respondent

first met Lanza when respondent was about 10 years old. Respondent worked during the summers at respondent's father's wholesale fish business on Washington and Montgomery Streets in San Francisco, and Lanza, about 15 years older than respondent, worked two doors down in an insurance and real estate brokerage business. Respondent was never Lanza's lawyer, although Ned Burns, a lawyer who shared office space with respondent, did represent Lanza in connection with a grand jury hearing into the 1958 Appalachin meeting. Although respondent has known Lanza his whole life, there has never been any sort of continuing relationship, business, social, or professional, between respondent and Mr. Lanza (e.g., First trial, 1729-1730).

C. There Was No Procedural Unfairness At Any Stage Of The Long Proceedings

1. Judge Thompson And Judge Smith In The First And Second Trials Properly Instructed That The Nut Tree Allegations Were False

As to the finding of falsity of the Nut Tree allegations, Judge Thompson in the first trial had instructed the jury that much hearsay and incompetent evidence was admitted to show petitioner's state of mind, but that only legal evidence would suffice on issues of truth or falsity. Judge Thompson's instruction in this connection, as well as the full context of Judge Smith's instruction on the same subject are included in the appendix at pp. A-3 and A-4.

Three of the alleged participants in the Nut Tree meetings, respondent, Angelo Marino, and Jack Goldberger, all denied that the alleged meetings took place (See Judge Thompson's instruction, Appendix p. A-3). At the

fourth trial, Judge Schwarzer noted that Goldberger was a disinterested witness (Petition, p. 30a). There is no evidence anywhere in the record that the Nut Tree meetings took place. In November of 1969, seventy persons employed by the Nut Tree Restaurant, being all the persons approached on the subject, gave statements that they had no evidence of the alleged meeting (C.T. 130-199). Also, in separate pre-publication interviews with the authors, Alioto and Goldberger denied facts necessary to the truth of the Nut Tree allegations (Petition, pp. 26a-27a). The FBI and CII had no information concerning the alleged meetings (Petition 25a-26a).

The petition quotes only half of the pertinent rule, which in its entirety is:

> "A verdict upon an issue of fact should not be directed in favor of the party who has the burden of proof with respect thereto, unless such fact is admitted, or is established by the undisputed testimony of one or more disinterested witnesses and different minds cannot reasonably draw different conclusions from such testimony." 88 C.J.S. Trial, ¶ 257(g), cited in *Powers v. Continental Casualty Co.*, 301 F.2d 386 (8th Cir. 1962).

Added to this is the concept that having published the allegations to millions of people, the publisher should bear some responsibility for their proof, at least after the plaintiff has offered competent disinterested evidence of their falsity. In addition, at neither the first nor the second trial did *Look* request an instruction similar in substance to Devitt & Blackmar's ¶¶ 17.21 or 73.12, which instructs that the jury is not bound to accept uncontradicted evidence.

In *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81 (1967), a First Amendment case, failure to object to erroneous jury instructions on malice precluded review by this Court of the instructions.

2. The Defamation Instruction At The Second Trial Satisfies California's Substantial Falsity Requirement

Petitioner cites only half of the California rule on substantial truth or falsity in libel actions. In its entirety the rule is stated as follows:

> "The textwriters substantially agree as to the rule, and it is well stated by Sutherland on Damages, volume 3, page 2626: 'A plea of justification is sustained by justifying so much of the defamatory matter as constitutes the sting of the charge. It is unnecessary to repeat and justify every word of the alleged defamatory matter, if the substance of the charge be justified. If the substantial imputations be proved true, a slight inaccuracy in the details will not prevent a judgment for the defendant, if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently than the actual truth would.' It is not the mere fact that a difference exists between the published report of the proceeding and the proceeding as it actually occurred, that determines the presence of the libel, but rather, is the difference of a substantial character, and does it produce a different effect?" *Hearne v. De Young,* 119 Cal. 670 at p. 674 (1898); *see also Kurata v. Los Angeles News Pub. Co.,* 4 Cal. App. 2d 224 at pp. 227-228 (1935); *Handelsman v. San Francisco Chronicle,* 11 C.A.3rd 381 at pp. 386-387 (1970); *Gantry Construction Co. v. American Pipe,* 49 C.A.3rd 186 at p. 196 (1975).

Judge Smith's defamation instruction at the second trial is set forth in the appendix hereto at p. A-2. That instruction correctly states the California law. The jury was to consider the issue of defamation only with respect to the parts of the article which the jury found to be false (" . . . would the untruths tend to defame Plaintiff to the average reader? In this connection, you must consider each portion of the article you find to be false in relationship to the whole article, including those portions found to be false or found or admitted to be true.")

The jury was instructed that it could not base its finding of defamation upon false statements in the article unless those false statements were injurious to plaintiff's reputation, viewing the article as a whole. Petitioner suggests at note 12 that it makes no difference whether respondent met with Fratianno at the Nut Tree or at respondent's office. If the meeting among Goldberger, Fratianno, and respondent at respondent's office in fact had the same strong overtones of conscious wrongdoing and willful breach of respondent's duties to the shareholders and depositors of the First San Francisco Bank as the Nut Tree meetings do, then petitioner's suggestion would be valid. But, in terms of defamatory content, there is a vast difference between the Nut Tree meetings of the article and the single meeting in fact of respondent with Fratianno and Goldberger. If the jury at the second trial thought the office meeting to be interchangeable with or not much different from the Nut Tree meetings, the jury was free, relying on Judge Smith's defamation instruction, to find the Nut Tree meetings false but answer the defamation interrogatory negatively. There was abundant sub-

stantial evidence in the record upon which the jury could and did find that there was a difference in kind between the Nut Tree meetings and the admitted meeting in respondent's office, as respects a tie between respondent and the Mafia. If petitioner seasonably had objected on appeal to the findings of falsity and defamation at the second trial, the objection would properly have been rejected on the merits.

3. The Ninth Circuit's Waiver Holding Is Clearly Correct

If *Look* disagreed with the finding of falsity of the Nut Tree meetings and their defamatory character, both made at the second trial, it should have raised its objection on respondent's appeal from the judgment in favor of *Look*. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 253-54; *Zimmerman v. Matthews Trucking Corp.*, 205 F.2d 837, 839 (8th Cir. 1953); *Oberman v. Dunn & Bradstreet, Inc.*, 507 F.2d 349, 353 (7th Cir. 1974). The finding of falsity and defamation but no malice in this case was quite similar to the finding of the patent's validity but no infringement in *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939). The successful defendant in that case obtained reformation of the decree to eliminate the finding of validity of the patent on defendant's own appeal. Certainly, *Look* in this case could have obtained review, by formal cross-appeal or even by argument in the brief, of the allegedly erroneous findings of the second trial. *Montgomery Ward v. Duncan, supra.* Having failed to do so, indeed, having proceeded through the third and fourth trial without objection to the second trial's findings of

falsity and defamation, *Look* was clearly precluded from raising an objection to those findings on the second appeal. *Richardson v. Communication Workers of America, AFL-CIO,* 486 F.2d 801, 803-05; *Haynes v. United States,* 418 F.2d 1380, 1382 (Ct. Cl. 1969); *Calhoun v. Bernard,* 359 F.2d 400, 401 (9th Cir. 1966). If *Look* could have cross-appealed or raised its objections on the first appeal, which clearly it could have, *Look's* attempt to distinguish the foregoing cases as involving successive appeals by the same party must fail. Also, in support of the proposition at page 14 of the Petition, that "an appeal from a final judgment draws into question all rulings producing the judgment," *Look* cites *Herron v. Rozelle,* 480 F.2d 282, 285 (10th Cir. 1973) and *Baldwin v. Redwood City,* 540 F.2d 1360, 1364 (9th Cir. 1976), both of which involved only a single appeal.

4. Petitioner Was Not Precluded From Proof Of Any Fact At Any Stage Of The Proceedings. The Fourth Trial Provides An Independent Basis For The Judgment

On the first appeal the Ninth Circuit remanded for a trial of malice only (Petition, 15a). Petitioner suggests that at the third and fourth trials petitioner was saddled with an erroneous finding of falsity and defamation as to the Nut Tree meetings. No rule or order however prevented petitioner from proving the truth of the Nut Tree meetings at the third or fourth trial or at any other stage of the case. At the third and fourth trials, petitioner produced Frank Greenleaf, who testified to a second meeting between respondent and James Fratianno. Greenleaf

was not known to petitioner until after publication of the article. Therefore, his testimony was relevant only to truth or falsity issues, not malice issues. Other "truth" witnesses produced by petitioner at the fourth trial were Yore and Demers of First San Francisco Bank. Also, the same evidence which conclusively showed the falsity of the Nut Tree allegations at the first trial was offered by respondent and received at the third and fourth trials (Fourth trial, Goldberger pp. 573-5; Alioto p. 839). The Ninth Circuit's limitation of further retrial to malice had no effect upon the proof presented by the parties at the third and fourth trials.

Although Judge Schwarzer was not free to retry the matter of falsity of the Nut Tree allegations, or defamation as to those allegations, he was not bound with respect to the issues of malice and damages. If, after hearing the evidence, Judge Schwarzer believed the Nut Tree allegations were true or if he thought that they were a harmless inaccuracy which did not affect the substance or gist of the Alioto-Mafia charge, he certainly would have found for petitioner on malice or damages or both. A finding of falsity is implicit in a finding of reckless disregard of the truth. A finding of substantiality of the falsity, or defamation, is implicit in the finding of damages as they are defined in California. (Civil Code § 48a: "General damages are damages for *loss of reputation,* shame, mortification, and hurt feelings.") Given petitioner's admission that the heart of the article is the Fratianno bank loans, there was substantial evidence to support Judge Schwarzer's finding and the Ninth Circuit's finding on the second appeal that the gist or sting of the article lay in the Nut Tree meetings. Judge Schwarzer

correctly concluded that with the Nut Tree related Fratianno bank loans to one side, there remains nothing except attorney-client relationships upon which to base the Mafia charge against respondent. There were honorable relationships, evidenced by proceedings in open court.

In short, if there was error at the second trial, it did not infect the judgment produced at the fourth trial, which judgment rests on its own independent support.

D. The Sufficiency Of The Evidence Of Malice Has Been Repeatedly Reviewed In The Lower Courts

1. Judge Schwarzer Used The Correct Constitutional Standard In Finding Malice

Early in the case, Judge Thompson denied petitioner's motion for summary judgment on the malice issue. Prior to the second trial, Judge Smith did the same. In entering judgment for petitioner after the second trial, Judge Smith did not hold that the evidence of malice by clear and convincing evidence was insufficient, but only that as the trier of fact, he would not have found malice. In reversing, the Ninth Circuit independently reviewed the evidence of reckless disregard and found it sufficient for submission to a jury. It is significant that none of three juries was willing to exonerate petitioner of the charge of reckless disregard or intentional falsity.

The evidence that petitioner published the Nut Tree allegations with knowledge of falsity or reckless disregard is clearly set forth in Judge Schwarzer's opinion and cannot be recounted here. Judge Schwarzer applied the correct rule—subjective awareness of probable falsity—in

finding malice. He listened to the authors and the Look editor testify to their good faith, and did not believe them, based on the objective facts and circumstances surrounding the publication of the article, particularly the Fratianno bank loans. Petition, 27a-31a. *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 1639 (1979); *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 1326 (1968).

2. There Is No Conflict Among The Circuits

The rules of law appearing in the appellate opinions in this case do not conflict with those of any other circuit or with the cases cited at page 20 of the Petition. *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859 (5th Cir. 1978); *Hotchner v. Castillo Puche*, 551 F.2d 910 (2nd Cir. 1975), *cert. denied* 434 U.S. 834 (1977); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Waskow v. Associated Press*, 462 F.2d 1173 (D.C. 1972). Those cases resulted in judgment for the publisher by reason of failure of proof, not because the rules of law were different from those applied in the case at bar.

IV

CONCLUSION

There is no merit in petitioner's contention that there was error in the falsity of defamation findings of the second trial. Both findings were fully supported by the record. When on the first appeal petitioner failed to cross-appeal or raise its objections to the findings at the second trial, it thereby precluded itself from raising those objections upon a subsequent appeal. Even if there was error at the second trial, that error did not taint the judgment

which resulted from the fourth trial. In a real and practical sense that judgment stands completely on its own footing. The District Court found all the facts necessary to a valid judgment after the Ninth Circuit had independently reviewed them.

This case has been correctly decided and should at long last be put to rest. The petition for certiorari should be denied.

Respectfully submitted,

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Dated: December 8, 1980

(Appendices Follow)

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APPENDIX A

Proceedings of October 25, 1972

Judge Smith's Instruction on Defamation

"If you reach question #2, you will, of course, have determined that a part or parts of the article were false. Then you must decide whether the article is defamatory. Obviously we may say many false things about a person without defaming him. Thus, the article in question states that plaintiff is bald. Had it said that he had a heavy head of hair, that would be a false statement but not a defamatory one. A statement, writing, picture, diagram and so on is defamatory if it exposes any person to hatred, contempt, ridicule or obloquy (meaning disgrace or bad repute) or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation; the defamation must appear on the face of the article, that is, without the aid of any facts which do not appear in the article. In determining whether the article is defamatory you must determine the probable effect of the article upon the mind of the average reader. In other words, would the untruths tend to defame Plaintiff to the average reader? In this connection, you must consider each portion of the article you find to be false in relationship to the whole article, including those portions found to be false or found or admitted to be true. Any falsehood taken in conjunction with the whole of the article as viewed by the average reader is defamatory, then that is sufficient. The article must be read as a whole in order to understand its import and the effect which it was calculated to have on the reader and construed in the light of the whole scope an apparent object of the Defendant, considering not only the actual language used but the implications of it—the sense and meaning which may have been fairly presumed to have been conveyed to those who read it."

APPENDIX B

Proceedings of May 12, 1970

Judge Thompson's Instruction On Falsity Of Nut Tree

"Normally, hearsay evidence will not be considered as legal evidence to prove a fact in court. For example, unauthenticated documents and statements made by a person out of court, not under oath and not subject to cross-examination. For this reason, the evidence which has been received here for the limited purpose as stated above cannot be given any weight or effect on the issue of the falsity of the disputed facts stated in the article.

"An example of this is the alleged Nut Tree meetings referred to in the article. There is no evidence in the case from which you properly could find that such meetings took place. The authors' notebooks, the transcripts of Carlson's conversations with Tommy Lee Thomas, and even the deposition testimony of Tommy Lee Thomas, are all hearsay and incompetent to prove that the meetings occurred. The only evidence in the case on the issue, that is, the testimony of the plaintiff and of Jack Goldberger and of Angelo Marino, denies that the meetings occurred, and there is no legal and competent evidence to the contrary.

"So, when you are considering the issue of whether the published article is false and you come to the disputed statements in the article regarding the Nut Tree meetings, it should be clear to you that the competent evidence in the case on the issue will support only a finding that the statements are false. This is stated as an example, and you will find other situations of the same kind in the course of your deliberations." Transcript of May 12, 1970, pp. 56-57.

APPENDIX C

Proceedings of October 25, 1972

Judge Smith's Instruction on Falsity of Nut Tree

"Now, during the course of this trial there were several occasions when I advised you that evidence was being received for the limited purpose of showing state of mind. Now, to elucidate this proposition more fully, let me now say this. If the state of mind were not important as it bears on the issue of actual malice, much of the evidence which is now before you would not have been received. An example of this is the authors' notebooks. They are not proof of the facts stated in them. They are to be considered by you only in connection with the Defendant's state of mind.

"For this reason the evidence which has been received for a limited purpose cannot be given any weight or effect on the issue of the falsity of the disputed facts stated in the article.

"An example of this is the alleged Nut Tree meetings referred to in the article. There is no evidence in this case from which you properly could find such meetings took place. The authors' notebooks, the transcripts of Carlson's conversations with Tommy Lee Thomas, and even the deposition testimony of Thomas are all hearsay and incompetent to prove that the meetings occurred. The only legal evidence in the case on the issue denies that the meetings occurred and there is no legal and competent evidence to the contrary. So, when you are considering the issue of whether the published article is false—and that, of course, is the issue outlined to you in question #1 here—and you come to the disputed statements in the article regarding the Nut Tree meetings, it

should be clear to you that the only competent evidence in this case on the issue will support only a finding that the statements are false. That these statements are false does not indicate to you that there is no evidence, which, if believed by you, would support the truth of other contested fact issues."

APPENDIX D

Excerpts from August 12, 1969 pre-publication interview between respondent and authors Carlson and Brisson. (The full transcription of the interview was received in evidence at the fourth trial as Plaintiff's Exhibit 5. The transcription from the tape recording of the interview, which tape recording was consented to by respondent, was made by petitioner. The recording was played for the Look editors shortly after August 12, 1969 and prior to publication (e.g., Third trial, proceedings of October 29, 1976, pp. 702-709; fourth trial, p. 410). At the August 12, 1969 interview the authors did not directly confront respondent with the Nut Tree allegations (e.g., third trial, 706, 709), although those allegations by that time had been incorporated into the draft of the article (Petition, p. 10a)).

The questions were asked by the authors, Carlson or Brisson:

"....: Frank Bompensiero.

"MAYOR ALIOTO: Who?

"....: Frank Bompensiero.

"MAYOR ALIOTO: Frank Bompensiero. Never heard of him. Never heard of him. Never heard of him. Never heard the name.

"....: Frank La Porte?

"MAYOR ALIOTO: Frank Who?

"....: Frank La Porte.

"MAYOR ALIOTO: La Porte? Never heard of the man.

"....: Carlos Marcello.

"MAYOR ALIOTO: Who?

"....: Carlos Marcello.

"MAYOR ALIOTO: Never heard of the man.

".....: Jimmy Fratianno?

"MAYOR ALIOTO: Yes, I have heard of Jimmy Fratianno.

".....: I gather your reaction—

"MAYOR ALIOTO: Oh, lord. Well, I had this from Ed Montgomery. You know, it is getting more ridiculous. You know, the thing about it, you know, I'm not blaming you for this but Charles Raudebaugh and a few of the other guys have investigated and then dismissed it—go around talking all around town, you know, about Fratianno's tied up with the Mayor, and all this kind of stuff.

"I was sitting in my rice office one day when I was Chairman of the Board of the First San Francisco Bank, doing damned little banking, and Jack Goldberger, whom you know, the Teamsters Union, comes in the office with a guy named Fratianno. I had never seen the guy before in my life, and I don't believe I have seen him since, unless he came back from the Bank afterwards with Jack. But in any event, the picture I have is Goldberger bringing this fellow in.

"And he said this fellow's going to go into the trucking business. You know, the Teamsters have a little jurisdictional dispute as between one local and another union. And Goldberger was interested in putting this guy in business in Sacramento—he said he was going in business in Sacrament on a bulk grain thing. And could he have the Rice Growers' business? And I said, hell, no. We've been dealing with somebody in the Rice Growers' business for 25 years and he can't have the Rice Growers' business.

"I haven't seen this guy before, didn't know anything about him. And Ed Montgomery told me recently he had a record, which is the first knowledge I have had this guy had a record. I said no, you couldn't have the Rice Growers' business. So then he said, Well, now, he is going up there in the bulk grain business and we think it's going to be a successful thing. He is going to build a big fleet. Jack Goldberger talking all this time. He was saying a few words. Would you help him with a loan over at the First San Francisco Bank? I said, Jack, if you can vouch for the fellow, why I'll call Nick Rizzo right now, and I went through this act 101 times with friends of mine. I mean, if Bill had walked in at that time I would have done it, too. And I called over and say, Nick—Nick Rizzo—Nick, Jack Goldberger has a friend whom he wants to have financed on something. They'll come over and see you right now. They walk out of my office to go over to the Bank, which is three blocks down the way, and as I have done a thousand and one times, I pick up the telephone again and I said, Nick, I don't know these people from Tom Mix. You have to make the loan strictly on the merits. And I was always careful that nobody could ever say that the Bank made a loan at my importuning that went bad. Always very sensitive about that situation.

"As I say, I've had friends of mine come in from school whom I hadn't seen, you know, since grammar school days. Joe, I have this little business I would like you to help me finance. I couldn't get financing. I go through the same act. So I will be glad to tell Mr. Rizzo you're coming over. And then call up Nick and say, Look, Nick, I haven't seen this guy in 30 years. I don't know anything about him. Your

merits and responsibility. I did the same damn thing with Fratianno. Fratianno got a loan based on collateral. And at that time this little Bank was looking for loans. If you take the period of time involved, this is the time when we were taking six percent loans when we could have five percent loans from the Bank of America. The Directors themselves, to help the Bank along. And they gave him a collateralized loan. Collateralized loan. This is what the Chronicle finally told me, it was a collateralized loan. I didn't even know. I knew that he had some kind of a loan. And that's the beginning and the end of my relationship with a man named Jim Fratianno. And the only time I heard there was anything wrong with the guy was when Ed Montgomery told me in this office three weeks ago. It's all over town, you know.

".....: It was a bad loan?

"MAYOR ALIOTO: It's all—huh?

".....: It was a bad—

"MAYOR ALIOTO: That's what I found out. But I don't know how in the hell a collateralized loan can be a bad loan. They had the—they had the last—Ed Montgomery told me.

".....: Why didn't they repossess all the guy's trucks?

"MAYOR ALIOTO: I don't know anything about that. I don't know anything about the guy. But I want you to point out that even at this stage of the game Nick and I were fighting about the Bank policy. I was going for mergers and Nick was going for this very conservative little Bank here in San Francisco. But you know, you get—you

associate me with Fratianno on this kind of a record—and it's all over town now that I have been dealing with a guy named Fratianno, is a little bit—it's a little bit, not really fair. Go ahead.

".....: Mr. Mayor, that was the first—that was the day before, the same day he got the loan, he put in the application. Was that—

"MAYOR ALIOTO: Oh, I don't know when—the minute I sent him over to Nick—

".....: Oh, you sent him over to the Bank?

"MAYOR ALIOTO: The minute I sent him over to the Bank, and then called Nick and said, I don't know these people from Tom Mix. And I know Jack Goldberger, obviously. Jack and I had been in campaigns together since the New Deal. I just knew Jack politically. And not too well at that—I wasn't that active. Once I performed this little ceremony, which I had a thousand and one times even with some very good friends, you know, some very good friends of mine went down, and I know he is a good character, and he wanted a loan, but he had not been successful particularly, I called Nick and said, Look, Nick, I'm sending this guy over and I want you to know right now you are vouching for the loan. Never me. And I have a record where nobody can call up—nobody in that Bank could ever call up and say, Look, Alioto, you sent a bad loan over to us, whether be a good man, bad man, friend, foe, or otherwise. I'm going to keep that record, too.

"But the—once I sent him over, I don't know what the course of things was from there on. I haven't the slightest idea.

".....: You are talking of that loan?

"MAYOR ALIOTO: I don't know the course of things was. I have given you the whole story—

".....: Did Angelo Marino accompany Mr. Goldberger to your office that day?

"MAYOR ALIOTO: No, I don't recall that he did. I don't recall that he did.

".....: He might have, though?

"MAYOR ALIOTO: No, I don't recall that he did. I have—this was in the rice office on the 19th floor at 111 Sutter—or the 20th floor of 111 Sutter Building, and I have a recollection that Goldberger and this fellow telling me about this new method of handling bulk grain, you know, we had been doing that for years and they thought they had something new. And this—

".....: Was Goldberger a friend of Marino's?

"MAYOR ALIOTO: I haven't the slightest idea.

".....: You don't know whether Marino was present or not?

"MAYOR ALIOTO: I don't remember him being present. I have no recollection of his being present with Fratianno. It was Goldberger who came in and Goldberger who vouched for him and Goldberger who took him to the Bank.

".....: Was Marino banking with that Bank, by the way, at that time?

"MAYOR ALIOTO: No. He never banked—he banked at Bank of America, I think. We had no branch in San Jose, you know. We just had the San Francisco branch.

".....: We are talking about Bank of America on Columbus, aren't we?

"MAYOR ALIOTO: No, no, that was Bank of America in San Jose. The cheese plant is located in San Jose, you understand. But I don't—Now I don't know whether Marino banked—I think think he was. I never heard that he was. Never heard that he was. And that's a simple matter of taking the Bank record, I think. But I don't recall of any dealings at the time of his SB—the small business loan—that there was any participation by anybody but the Bank of America. And I assume therefore he had to be banking with them since they were involved.

".....: Did you at any other time meet with Jimmy Fratianno or Marino or anybody else?

"MAYOR ALIOTO: Never, never. The only time I remember seeing Fratianno was on this occasion. That's the only time."

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No. 80-628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COWLES COMMUNICATIONS, INC.,

Petitioner,

vs.

JOSEPH L. ALIOTO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

Respondent's opposing brief is illogical and profuse with irrelevant matter.[1] It does not justify denial of review of a judgment that raises serious and important First Amendment questions. We briefly reply to the main points it attempts to make.

---

[1] Several irrelevant statements (*e.g.*, that Alioto has argued two cases in this Court, has built a large law firm and had a "brilliant academic career") were obviously inserted to ingratiate. The many references to the first and third trials are irrelevant because those trials ended in hung juries.

I. ALIOTO'S "HEART OF THE ARTICLE" ARGUMENT.

The truth of the LOOK article's statement that Alioto's First San Francisco Bank made loans to Fratianno totaling $105,000 is undisputed. Alioto's brief argues (at 10-15) that these bank loans are the "heart of the article" and that if the statements concerning Alioto's Nut Tree meetings with Fratianno are false, the article considered as a whole becomes substantially false. This argument is fallacious for two reasons.

First, it assumes that without the Nut Tree meetings there would be virtually no connection between Alioto and the Fratianno bank loans. However, there are at least three other connections in the record separate and apart from Nut Tree. Prior to the loans, Fratianno made several long distance telephone calls to Alioto, Fratianno met with Alioto at least once in Alioto's office, and Alioto called a loan officer at the bank and recommended Fratianno for the loans, saying "his credit is considered good by all with whom he has done business." (T.R. 1254, Second Trial.) Thus, if the Fratianno bank loans are the "heart of the article," Alioto's connections to them are amply supported without regard to whether or not Alioto met with Fratianno to discuss the loans at Nut Tree.

Second, Alioto's argument at the very most presents an untried question of fact. It clearly cannot be held as a matter of law that if the bank loans are the "heart of the article" and the Nut Tree statements are untrue, the article read as a whole is substantially false. As shown in the Petition (at 16-17), petitioner has *never* had a trial and determination by a trier of fact of the factual issue of substantial truth of the article read as a whole.

II. ALIOTO'S ARGUMENT CONCERNING THE DEFAMATION INSTRUCTION AT THE SECOND TRIAL.

Alioto does not attempt to defend the first interrogatory at the second trial, "Was the article false in one or more particulars?" He relies instead on the instruction that Judge Smith gave with the second interrogatory, "Was the article defamatory?" Alioto contends that this instruction properly informed the jury that it should consider the article as a whole. (Resp. Br. 17-19.)

However, the defamation instruction (reproduced in Resp. Br. at A-2) not only failed to cure the prejudicial error of the first interrogatory, it merely compounded that error.[2] In addition to being confusing and in some parts unintelligible, it compelled the jury to keep focusing on particular segments of the article, in accord with the first interrogatory and contrary to California law and the First Amendment. There is no doubt that the jurors were confused because after two days of deliberation they requested clarification. Judge Smith's "clarification" only worsened the error:

> THE COURT: Ladies and gentlemen, I have your question, and just for the sake of the record, I will read this.
>
> "If we find that one statement is false and defamatory, have we proven that the article is defamatory, or do we need two, three or four statements in the article to be proven false and defamatory in order to prove that the article is defamatory?"

---

[2] Petitioner specifically objected to Judge Smith's defamation instruction as "preclud[ing] the jury from finding truth or falsity of the article based on the truth or falsity of the article's central theme." (R.T. 177, 10/25/72.)

> Now, I would answer that in this way. If one statement taken in the article is false, and if that statement, read in the context of the entire article, is defamatory, then the article may be said to be defamatory. (R.T. 3, 10/26/72.)

The jury's question clearly demonstrates the prejudice wrought by both the falsity and the defamation interrogatories; for two days of deliberations the jury had been considering the article *not* as a whole but as an assortment of bits and pieces. Judge Smith's "clarification"—to which petitioner objected (R.T. 7, 10/26/72)—failed to eliminate that prejudice. On the contrary, by focusing the jury's attention on "one [false] statement," Judge Smith further clinched the deprivation of petitioner's First Amendment right to a determination of the substantial truth of the article considered as a whole.

III. ALIOTO'S WAIVER CLAIM.

Respondent's brief simply echoes the statements and citations appearing in the Ninth Circuit's opinion to support its technical holding of waiver. (Resp. Br. 19-22.) Respondent totally disregards this Court's long-standing presumption against waiver of fundamental constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In addition, respondent cavalierly ignores the repeated holdings of this Court in the *New York Times* libel context, requiring that when the defendant, as here, challenges the sufficiency of the evidence, there must be an independent examination of the record as a whole to determine whether the judgment constitutes "a forbidden intrusion on the field of free expression." *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 85 (1967). *See* cases cited in Petition 14. *Accord: Ryan v. Brooks*, ... F.2d ....., 6 Med. L. Rep. 2155 (4th Cir. Oct. 17, 1980). See also *Founding Church of Scientology v.*

United States, 409 F.2d 1146, 1164 n.2 (D.C. Cir. 1969), where the Court declared:

> "In any case, a denial of First Amendment rights is one of those exceptional instances where an appellate court will notice error in the charge even where no objection is made at trial."

CONCLUSION

For the foregoing reasons and those set forth in the Petition, we submit that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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